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Symbolic Religious Expression on Public Property: Implications for the Integrity of Religious Associations

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SYMBOLIC RELIGIOUS EXPRESSION ON PUBLIC PROPERTY: IMPLICATIONS FOR THE INTEGRITY OF RELIGIOUS ASSOCIATIONS

ANGELA C. CARMELLA*

ABSTRACT

When religious associations engage in symbolic expression, it matters whether they are on private property, in a public forum, or on closed government property. Only on private property and in public forums will the symbolic proclamations retain a connection with the speaker. When associations donate religious symbols to the state for display on closed government property, the state appropriates the symbols for its own purposes and as its own expression. In order for the display to comport with the current reading of the Establishment Clause, the government cannot adopt the religious message but must transform it into one that gives primacy to some civic or secular meaning. Government thus co-opts and dilutes the religious messages. Indeed, the mediating function of religious associations in society, which depend upon shared bonds of identity, purpose and expression, are weakened; tensions between church and state and between and among associations in society, necessary to this function, are relaxed. Other societal functions, such as limiting state power, are also threatened.

The symbols jurisprudence of the Establishment Clause, though often involving such donations, ignores these enervating impacts on donor associations and the wider implications for their significant societal functions. The Article discusses the need to coordinate laws relating to symbols on private property, in public forums, and in closed government spaces to protect the integrity of associations and their expression in a comprehensive way. It also considers the options of expanding public forums and of transferring public property into private hands as ways of protecting symbolic expression. This normative argument is drawn from the philosophical insights of both Catholic social theory and contemporary political theory.

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I. INTRODUCTION

Religious exercise and land use are intimately connected. Religious associations in civil society and their members practice their faith in particular places, on particular pieces of real property. A visual survey of the built environment will reveal numerous and diverse houses of worship, religious schools, religiously adorned homes, and symbols of faith. All of these religious land uses are inherently expressive, because religious architecture and symbols are “semiotic” in nature—that is, they “function as signs, conveying cognitive and emotional meanings” to those who view them.¹ The visual landscape thus conveys the message, in the most general sense, that religious associations are a persistently energetic presence in society.

But the particular messages that are conveyed will necessarily be indeterminate.² Religious groups cannot control the meanings their symbols convey. Of course they may intend a particular meaning, but it is not possible to “fix” that meaning because viewers will interpret the symbol based on histories and contexts beyond the group’s control. The cross, for instance, conveys innumerable messages; its meaning varies even among Christians. Indeed, when the Veterans of Foreign Wars placed a large, white cross atop Sunrise Rock in a California desert in 1934, it intended to honor the war dead by evoking the image of military cemeteries with row upon row of white crosses.³ It did not intend to provide a site for Easter services for generations of Christian worshippers, which it unwittingly did.⁴ We can see the variety of meanings a symbol can generate when we consider how the Ku Klux Klan has used the cross as a symbol of racism for nearly a century. But when the Klan sought permission to display a cross on the plaza in front of the Ohio state house in 1993, the Supreme Court refused to view it as political expression and interpreted it instead as a traditional Christian symbol.⁵

Nor do religious groups “own” the symbols they use in worship and in their own sacred spaces. Quasi-religious and secular associations freely make use of religious symbols and texts. While many Christians and Jews revere the Ten Commandments as the

1. John J. Costonis, *Law and Aesthetics: A Critique and a Reformulation of the Dilemmas*, 80 MICH. L. REV. 355, 392 (1982).

2. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1135-36 (2009) (noting that more than one meaning can be associated with a symbol and that such meanings can change over time and in different contexts). For a discussion of legal problems raised by attempts to own symbols and control their meaning, see generally David A. Simon, *Register Trademarks and Keep the Faith: Trademarks, Religion and Identity*, 49 IDEA 233 (2009).

3. *Salazar v. Buono*, 130 S. Ct. 1803, 1811 (2010).

4. *See id.* at 1816.

5. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995).

Word of God, consider the actions of the Fraternal Order of Eagles, a civic-minded, benevolent organization. It donated hundreds of Ten Commandments monuments to local and state governments all over the nation throughout the mid-twentieth century, believing that the moral message of the text would help fight juvenile delinquency.⁶ Governments, too, have employed religious symbols and texts for civic and patriotic purposes for centuries.

Despite the fact that religious associations do not—indeed cannot—“own” the symbols they use or control the meaning they intend to convey, they know what they intend to express and will continue to proclaim their beliefs using symbols as a dimension of religious exercise.⁷ They may wish to transmit the core of the symbol’s message as it has been historically understood in a way understandable by this generation with an eye to passing it on to the next. Surely a cross may have innumerable meanings based on viewers’ perspectives, but most Christian communities all over the world will undoubtedly use it to express their specific unequivocal belief in salvation through Christ’s death and resurrection. This type of symbolic expression of religious identity and purpose are critical to the ongoing formation and practice of faith. As with any group, the promotion of group identity, purpose and expression have significant implications for the health of associations in civil society. In short, religious groups will create and re-create themselves using religious symbols, texts, and objects to convey their messages, not as owners of the symbols but as stewards, and they will do so regardless of how that particular message might be misperceived or challenged by viewers.

The location of a religious association’s symbolic expression will call for varying degrees of government involvement. When religious groups use their privately owned real property for symbolic expression, we typically assume that the intended “message” belongs to the group (even if the *symbol* does not belong to the group and the *message* cannot be controlled). We know, for instance, that a traditional nativity scene at Christmastime in front of a church is intended to celebrate the birth of a Savior. While a zoning ordinance might regulate the crèche’s size or placement, the church will be free to display this symbol on its own property. Similarly, when religious groups engage in symbolic expression within a government-owned public forum (like a park or plaza), we also assume that the intended “message” belongs to the group. So that same church, placing a crèche in the park along with a sign containing the sponsor’s name,

6. Van Orden v. Perry, 545 U.S. 677, 682 (2005).

7. Architecture also involves proclamation of faith. See Angela C. Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 VILL. L. REV. 401 (1991) [hereinafter Carmella, *Houses of Worship*].

tells the viewer that the church celebrates the birth of a Savior. And as long as the display comports with time, place, and manner regulations, the church is free to express itself symbolically since the private character of the speaker and the speech is preserved in such a forum.⁸ Further, a message can retain its integrity in public spaces where religious symbols have been placed spontaneously, without government knowledge or involvement, in what could be considered *de facto* public forums.⁹ That same church, placing a crèche on the broad median strip every year for sixty years without seeking anyone's permission, is giving voice to its belief that a Savior is born.¹⁰ On private property and in independent public spaces, then, the symbolic expression—the intended proclamation—“belongs” to the religious association even if the symbol itself does not.

But if the church approaches the government in order to loan or donate the nativity scene for public display on government property that is not a public forum, everything changes.¹¹ Religious groups in such situations likely think the expression continues to be theirs; they do not necessarily consider the implications of government acceptance of their symbols. But under Supreme Court doctrine, once the symbol is accepted, the message becomes government speech.¹² The state thereby appropriates the symbol *for its own purposes and as its own expression on its own property*. And in order for the display to comport with the current reading of the Establishment Clause, the government cannot support the church's message that a Savior is born; it must change the message to one that gives primacy to some civic or secular meaning. Thus, the crèche must be contextualized among objects within a secular tableau so that its religious meaning is diminished—in essence, redefined to celebrate instead a season of goodwill.¹³ In my view, whether government endorses the church's message or redefines it, the state's acceptance and appropriation of the religious symbol threatens the donor's independence, undermines the integrity of its religious expression, and further distorts interactions among religious associations and between those associations and the state.¹⁴

8. See *infra* notes 190-201 and accompanying text.

9. See *infra* notes 202-205 and accompanying text.

10. See *Satawa v. Bd. of Cnty. Rd. Comm'rs*, 687 F. Supp. 2d 682, 686-87 (E.D. Mich. 2009).

11. Because I am most concerned with the impact on donor groups and others that share the donor's meaning, this Article does not focus on situations in which government officials themselves create the religious display, as in *McCreary Cnty. v. ACLU*, 545 U.S. 844 (2005) (Ten Commandments displays in courthouse).

12. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1129 (2009).

13. See *Lynch v. Donnelly*, 465 U.S. 668, 681 (1984).

14. See *infra* notes 36-43 and accompanying text. Some might reject the notion that a religious group's symbolic message can be converted into a different (secular or civic) message for government's own purposes. In other words, one might say a crèche or menorah will always have a religious meaning regardless of the state's (or a court's)

These dangers exist primarily in connection with theologically significant symbols that are part of the active life of religious organizations like crèches, menorahs, crosses, and Ten Commandments displays.¹⁵ Indeed, when the religious organization Chabad placed a menorah on the steps of the City-County Building in Pittsburgh more than twenty years ago, it thought that the space was a public forum to which it had a right of access; it vigorously opposed the view that its menorah was somehow part of government expression. But the Supreme Court in *Allegheny County v. American Civil Liberties Union*¹⁶ found the menorah, as it was situated next to a Christmas tree and sign saluting liberty, to be part of the government's secular message of pluralism. Had the Court found the location to serve the expressive purposes of an open forum, the message conveyed would have been Chabad's undeniably religious message, and there would have been no need for state involvement in the content of that message, no need to transform it from a message commemorating a miracle to a message celebrating American pluralism. The integrity of the religious association and its expression would have been maintained.

characterization of its meaning. Others might accept that a donated symbol can be converted for the government's communicative purposes but think this is reasonable as long as religious groups still have their private and public forum spaces in which to express their messages. But these questions are inapposite to my concerns, which focus on the resulting church-state relationship between government and the donor religious groups. In short, "religious believers should not look to the state as a surrogate for their own efforts to get religious messages into public life." E. Gregory Wallace, *When Government Speaks Religiously*, 21 FLA. ST. U. L. REV. 1183, 1256 (1994) (noting that government uses religious symbols for furthering political agendas, and that such use may corrupt theological meaning).

15. The discussion in this Article centers on religious symbols in the life and expression of mediating associations and argues for an Establishment Clause interpretation that protects associational vibrancy in civil society. I have focused on symbols like crèches, menorahs, crosses, and Ten Commandments displays. These are specifically contrasted with civic symbols that contain religious elements, as I do not believe that government use of these symbols creates any harmful relationship between mediating groups and the state. It does not compromise their identity and purpose, nor does it dilute their messages. Even the Liberty Bell in Philadelphia contains an inscription from the book of Leviticus: "Proclaim Liberty throughout all the Land unto all the Inhabitants thereof. Lev. XXV X." Brief of International Municipal Lawyers Ass'n as Amicus Curiae in Support of Petitioner at 18-19 & n.10, *Salazar v. Buono*, 130 S. Ct. 1803 (2010) (No. 08-472) (quoting *Leviticus* 25:10) (internal quotation marks omitted). These are not the kinds of symbolic expression the Religion Clauses should address. The Court recognizes, albeit awkwardly, that there are categories of governmental use of religion that fall outside the normal proscriptions of the Clause. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 33, 36-37 (2004) (O'Connor, J., concurring) (finding "under God" in pledge of allegiance to be an example of ceremonial deism); *Lynch v. Donnelly*, 465 U.S. 668, 687, 692-93 (1984) (O'Connor, J., concurring) (noting ubiquity and history of government acknowledgements of religion that serve secular purpose of solemnizing public occasions).

16. 492 U.S. 573 (1989).

This Article focuses on the church-state relationship that results from situations in which religious groups seek to loan or donate their symbols for display on public property and on the broader societal harms that occur. Once the state adopts a particular theologically significant symbol, tensions necessary to the mediating function of groups in civil society are relaxed.¹⁷ One religious group now has state power behind its symbolic expression, which corrodes the necessary distinction between state and church, threatening a collapse of identity and voice and destroying the independence of the association. Obviously, once one religious message is privileged, the tensions are broken that would otherwise sustain open access for multiple voices to independent public spaces. Further, the interaction among religious associations in society becomes distorted, because the state has appropriated the voice of one and not others, thereby threatening the mediating role for all groups—those who share the symbol and those who do not.

The appropriation of religious messages also threatens another important function of religious groups: limiting the state and maintaining the boundary between civil society and the state.¹⁸ Religious groups limit the state not only by their existence but also by prophetic critique of the state and its authoritarian tendencies.¹⁹ Government co-optation of the messages of some religious groups practically ensures that they will be less vibrant messengers in society, making it much harder for them to be critical of government. Thus, the protection of religious identity, purpose, and expression becomes harder to achieve in the context of closed government spaces, where government's management of its property easily dilutes the meaning of theologically significant symbols and enervates the religious associations that steward those symbols.

In the symbols jurisprudence, the Court misses an opportunity to attend to the importance of mediating associations. Many of the cases involve government acceptance and appropriation of symbols that groups have donated for temporary or permanent display. Yet instead of focusing on those donors and the resulting church-state relationship and societal implications, the Court gives primary consideration to a symbol's meaning in a given context. This futile attempt to "fix" what is indeterminate produces an abstruse and fractured jurisprudence: one crèche is constitutional, while another is

17. See *infra* Part II.B.

18. See, e.g., Angela C. Carmella, *Responsible Freedom under the Religion Clauses: Exemptions, Legal Pluralism, and the Common Good*, 110 W. VA. L. REV. 403, 409-12 (2007) [hereinafter Carmella, *Exemptions*].

19. See, e.g., Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385 (2004).

not;²⁰ this Ten Commandments display is constitutional, but that one is not;²¹ one cross is constitutional, another is not.²² It may be true that many members of the Court have recognized negative impacts of government use of religious symbolism of one sort or another: for instance, it is commonly noted that members of minority faiths or no faith at all will feel excluded, or that those who share the faith will feel offended. Yet no one on the Court specifically engages the issue of harm to the independence and integrity of religious associations (and their messages) when government promotes the very same message, or uses the same symbol to promote a different one. The Court fails to appreciate the extent to which such governmental use of religious symbols distorts the relationships between and among varying and often competing associations within civil society, and thus, the Court changes the terms of the relationships between these groups, their members, and the state.²³

My normative position, as I have expressed it in a series of articles, is drawn from the philosophical insights of both Catholic social theory and constitutional jurisprudence.²⁴ This Article focuses on the Supreme Court's Establishment Clause jurisprudence as it concerns religious groups that seek to express themselves through symbols on public property. As for private property, I have argued elsewhere against restrictions on responsible religious land use and symbolism, whether by governmental zoning and preservation²⁵ or private rules of condominium and homeowner associations.²⁶ In those articles, I noted that restrictions on religious exercise on public property have made private property the primary locus for religious exercise. In this Article, I provide a normative rationale for those restrictions where symbols are donated for display in closed, government-controlled spaces. In such situations, the state is overly involved in interpreting and revising the content of the symbolic expression of religious associations. But in public forums, by

20. Compare *Lynch v. Donnelly*, 465 U.S. 668 (1984) with *Cnty. of Allegheny v. ACLU*, 492 U.S. 573 (1989).

21. Compare *Van Orden v. Perry*, 545 U.S. 677 (2005) with *McCreary Cnty. v. ACLU*, 545 U.S. 844 (2005).

22. Compare *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) with *Salazar v. Buono*, 130 S. Ct. 1803, 1813 (2010) (acknowledging *Buono v. Norton*, 371 F.3d 543, 549-50 (9th Cir. 2004)).

23. See *infra* notes 181-183 and accompanying text.

24. See Angela C. Carmella, *RLUIPA: Linking Religion, Land Use, Ownership and the Common Good*, 2 ALB. GOV'T L. REV. 485 (2009) [hereinafter Carmella, *RLUIPA*]; Angela C. Carmella, *Religion-Free Environments in Common Interest Communities*, 38 PEPP. L. REV. 57 (2010) [hereinafter Carmella, *Religion-Free Environments*].

25. Carmella, *Houses of Worship*, *supra* note 7; Carmella, *RLUIPA*, *supra* note 24.

26. Carmella, *Religion-Free Environments*, *supra* note 24.

contrast, the state is only minimally involved and associations are able to retain their identity and voice.²⁷

Focusing on the associational health of religious associations allows us to connect developments across different areas of law and create a more holistic and balanced approach to associational expression on private *and* public property. Currently, the lack of coordination is starkly apparent.²⁸ A religious group might not be able to build a house of worship on property it owns (because of zoning controls), or rent space in the public library for worship (because of public forum restrictions); some of its members living in a subdivision might not be able to affix religious symbols to their houses (because of homeowner association rules); but the group might be able to donate a symbol of its faith to a local government for display in front of the municipal building (provided it is placed alongside other symbols that sufficiently diminish the religious content of the message). Such a lack of coordination produces an inversion of commonly held expectations regarding private and public property. It is time to coordinate these areas of law to protect associations and individuals in their expressive freedoms, particularly on private property and in broadly defined independent public spaces like public forums.

The Article is organized as follows. Part II provides a description of responsible freedom for religious associations, a theme I have developed elsewhere,²⁹ particularly as those groups mediate between individuals and the state. I emphasize that important tensions between state and nonstate actors sustain both liberty and order. I make the argument that the government's acceptance and appropriation of theologically significant symbols is harmful to religious associations because it reduces those tensions and compromises their mediating functions. Part III documents the

27. By focusing on the relationship between government and religious associations, we see that independent public spaces, like public forums, do not involve government in religious symbolic expression. In traditional and designated public forums, religious messages are treated on par with nonreligious speech. Within the public forum, the state does not embrace the speaker's message or threaten to absorb the speaker's identity as can happen when government promotes the group's message or appropriates it as its own.

28. See *infra* Part III.C. Severe land use controls on the building of houses of worship and other religious uses prompted Congress in 2000 to pass protective federal legislation for private owners, yet some courts continue to condone unwarranted restrictions. Additionally, private restrictions on residential property have become more prevalent, with condominium and homeowner association covenants impeding religious uses and placement of symbols. Further, some restrictions on religious use in public spaces (otherwise available for private uses) have been found acceptable under the public forum doctrine. In remarkable contrast, the law is far more amenable to the display of theologically significant symbols on public property.

29. See, e.g., Angela C. Carmella, *The Protection of Children and Young People: Catholic and Constitutional Visions of Responsible Freedom*, 44 B.C. L. REV. 1031 (2003); Carmella, *Exemptions*, *supra* note 18.

inadequate attention given to religious associations in the Court's religious symbols jurisprudence, as well as the additional problems created by the Court's flawed understanding of what renders a public display of theologically significant symbols constitutional. The section also notes the lack of coordination among bodies of law governing private, public forum, and public property, which prevents the development of a comprehensive vision for protecting the mediating function of religious associations in civil society. Part IV discusses the most recent Supreme Court decision concerning religious symbols, *Salazar v. Buono*,³⁰ and assesses practical remedies—the creation of public forums and, at issue in *Salazar*, the transfer of public property into private hands—that protect expressive association.

II. RELIGIOUS FREEDOM FOR ASSOCIATIONS (AND THEIR MESSAGES) IN CIVIL SOCIETY

The Supreme Court unanimously agrees *in principle* that there are constitutional limits to religious symbolism on public property. But those limits are nevertheless highly contested. Some on the Court read the Establishment Clause to forbid only those religious displays characterized by coercion or proselytization,³¹ or that are narrowly “sectarian.”³² Some read it to create a presumption against *any* religious symbol on *any* government property, even in public forums and even on private property formerly owned by the government.³³ One justice has offered an approach based on the exercise of “legal judgment,” which seems to involve a balancing of relevant factors.³⁴ Others have employed the “endorsement test” to disallow any display that would make religion relevant to a citizen's standing in the political community, in the eyes of a “reasonable observer.” This endorsement inquiry asks whether the symbolic expression “sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”³⁵

While political equality and civic peace are commonly noted justifications for restricting religious symbolism on governmental property, the most compelling reason in my view is really quite

30. 130 S. Ct. 1803 (2010).

31. See, e.g., *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 659-60 (1989) (Kennedy, J., concurring in part, dissenting in part).

32. See, e.g., *McCreary Cnty. v. ACLU*, 545 U.S. 844, 868 (2005).

33. See, e.g., *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 797 (1995) (Stevens, J., dissenting); *Salazar v. Buono*, 130 S. Ct. at 1828 (Stevens, J., dissenting).

34. *Van Orden v. Perry*, 545 U.S. 677, 700 (2005) (Breyer, J., concurring).

35. *Lynch v. Donnelly*, 465 U.S. 668, 688 (O'Connor, J., concurring).

simple: to preserve religious freedom primarily for religious associations that steward those symbols and, derivatively, for the individuals who value them. State adoption of theologically significant symbols as its own expression on its own property threatens the independence of religious groups in society and compromises their messages. Restraint on the part of government is required as an outgrowth of our overarching constitutional design of limited government, which acknowledges a “private”³⁶ sphere—that is, civil society—in which nonstate actors and private property play a critical mediating role between the individual and the state.³⁷ Indeed, the Court has noted that “[t]he design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission.”³⁸ Under this constitutional design, government is disabled in a particular way with respect to religion: the state is not competent to determine religious truth, to espouse religious teachings, or to set up or affiliate with a church. If it could do these things, religious freedom in a vastly pluralistic society like ours would be illusory.

While government restraint guarantees freedom in that “private sphere,” the responsibility for religious exercise falls squarely on nonstate actors in civil society—such as families and religious associations (i.e., religious institutions and less formalized religious groups)—to undertake religious activities, including theologically meaningful land use. And it is obvious that when these groups give voice to their faith through the display of symbols, objects, and texts, they do so primarily on their own property, at their homes, and at religious buildings, as well as in independent public spaces like public forums, where the expression can be fully their own.³⁹ But when religious associations ask the state to approve and adopt their symbols for placement on public property, religious identity and expression are deeply compromised. Indeed, when government accepts theologically significant symbols for display on its own property, it appropriates those symbols as its own speech for its own purposes, which fundamentally dilutes and alters their religious

36. In this Article, “private” means nongovernmental. It does not mean activity that is hidden from public view.

37. See generally SEEDBEDS OF VIRTUE: SOURCES OF COMPETENCE, CHARACTER, AND CITIZENSHIP IN AMERICAN SOCIETY (Mary Ann Glendon & David Blankenhorn eds., 1995) [hereinafter SEEDBEDS OF VIRTUE].

38. *Lee v. Weisman*, 505 U.S. 577, 589 (1992).

39. Most religious associations in the United States own their own property. See Angela C. Carmella, *Land Use Regulation of Churches*, in RELIGIOUS ORGANIZATIONS IN THE UNITED STATES: A STUDY OF IDENTITY, LIBERTY, AND THE LAW 565, 566-67 (James A. Serritella et al. eds., 2006).

meaning and threatens the mediating function performed by religious associations in civil society.

The Court does not acknowledge these kinds of impacts on religious groups when it analyzes religious symbols on public property. Instead, its various members provide their own perspectives on religious freedom. The justices who are more amenable to religion on public property view such displays as a dimension of religious freedom, noting that the presence of nonsectarian symbolism simply accommodates the religiosity of the citizenry.⁴⁰ The justices who staunchly oppose religious symbols on public property do so, in part, on the assumption that religious groups and citizens have sufficient alternative outlets for expression at their privately owned homes and houses of worship.⁴¹ And those who use the endorsement test regard the religious groups whose symbols are adopted as “insiders” unfairly benefited by government privilege; they focus their concern on those who do not share the symbols and who suffer the ostracizing effects of the display.⁴² But no one on the Court ever squarely considers the possibility of negative impacts *on the religious actors*—those insiders—who steward the symbols.⁴³

40. See, e.g., *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 663 (1989) (Kennedy, J., concurring in judgment, dissenting in part) (Religious symbols “fall[] well within the tradition of government accommodation and acknowledgment of religion that has marked our history from the beginning.”).

41. See, e.g., *Van Orden v. Perry*, 545 U.S. 707, 735 (2005) (Stevens, J., dissenting) (Religious symbols can be “displayed in front of Protestant churches, benevolent organizations’ meeting places, or on the front lawns of private citizens” but not on “property that is located on the government side of the metaphorical wall.”).

42. *Cnty. of Allegheny*, 492 U.S. at 626 (O’Connor, J., concurring) (The crèche “conveys a message to nonadherents of Christianity that they are not full members of the political community, and a corresponding message to Christians that they are favored members of the political community.”).

43. One category of cases, the Native American lands cases, does acknowledge the severity of the impacts on tribal free exercise. See, e.g., *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988) (road through sacred lands would destroy religion, but no cognizable burden exists for constitutional purposes because no coercion is involved; Native Americans still have access to sacred sites). Though this Article focuses only on religious objects that are placed on public lands, as opposed to public lands that are themselves sacred to the group, the Native American situation is instructive. Though Native Americans have access to their sites, “those rights do not divest the Government of its right to use what is, after all, *its* land.” *Id.* at 453 (emphasis in original). The disregard shown the Native Americans suggests a similar attitude in the symbols cases: government will use the symbols *for its own semiotic purposes* on what is, after all, its own land.

A. Respect for Shared Identity, Purpose, and Expression: Protecting the Mediating Role of Religious Associations

The distinction between civil society and the state is central to contemporary political theory,⁴⁴ as well as to the Catholic intellectual tradition which shapes my normative vision of the person, state, and society.⁴⁵ In this tradition, religious freedom is grounded in the dignity of the human person⁴⁶ who is, by nature, fundamentally social, “intelligent, reasonable, . . . responsible . . . and situated.”⁴⁷ Indeed, the person is “situated” in a thick web of multiple and varied nonstate social groups—families, neighborhoods, religious communities, work-related organizations, cultural groups, voluntary associations of all kinds, and market actors; many of these groups “mediate” between the person and the state. Together these social groups constitute a vibrant, pluralistic civic sphere and are responsible for promoting the common good—that is, the set of social conditions that facilitate human flourishing, enabling each person to “achieve the fullness of his own being.”⁴⁸

In contrast to civil society, the state (through law) plays a more defined and subsidiary (albeit critical) role in protecting human dignity and freedom.⁴⁹ The state’s main task is to ensure a piece of the common good known as the public order—protecting civil rights, public peace, and public morality. The state is also charged with the

44. See Nancy L. Rosenblum & Robert C. Post, *Introduction*, in *CIVIL SOCIETY AND GOVERNMENT* 1, 1 (Nancy L. Rosenblum & Robert C. Post eds., 2002) [hereinafter Rosenblum & Post, *Introduction*].

45. See generally Angela C. Carmella, *A Catholic View of Law and Justice*, in *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* 255 (Michael W. McConnell, Robert F. Cochran, Jr. & Angela C. Carmella eds., 2001) [hereinafter Carmella, *CHRISTIAN PERSPECTIVES*].

46. *Declaration on Religious Freedom*, in *THE DOCUMENTS OF VATICAN II* 675 (Walter M. Abbott, S.J., ed., 1966) [hereinafter *Declaration*]. As Pope John XXIII declared, the person is the subject, foundation, and end of the entire social life. *Pacem in Terris*, in *RENEWING THE EARTH: CATHOLIC DOCUMENTS ON PEACE, JUSTICE AND LIBERATION* 124, 130 (David J. O’Brien & Thomas A. Shannon eds., 1977). Twentieth century papal encyclicals and church statements have declared repeatedly that the person is the subject, foundation, and end of the social order. See, e.g., *id.*; see also Gregory Kalscheur, S.J., *Moral Limits on Morals Legislation: Lessons for U.S. Constitutional Law from the Declaration on Religious Freedom*, 16 *S. CAL. INTERDISC. L.J.* 1, 28 (2006) (“The right to religious freedom articulated by the Council is rooted in a commitment to respect the exercise of responsible freedom that is demanded by human dignity.”).

47. Thomas C. Kohler, *Civic Virtue at Work: Unions as Seedbeds of the Civic Virtues*, in *SEEDBEDS OF VIRTUE*, *supra* note 37, at 131, 155.

48. JOHN COURTNEY MURRAY, S.J., *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* 328 (1960). For discussion of the various approaches to the common good, religious and philosophical, see ROBERT K. VISCHER, *CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE* 104-18 (2010) [hereinafter VISCHER, *CONSCIENCE*]; Michael W. McConnell, *Believers as Equal Citizens*, in *OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH: RELIGIOUS ACCOMMODATION IN PLURALIST DEMOCRACIES* 90 (Nancy L. Rosenblum ed., 2000).

49. See generally Kalscheur, *supra* note 46.

task of coordinating and assisting nonstate actors in *their* promotion of the common good but must do so without assuming or absorbing the independent functions of these actors.⁵⁰ This is a model of “subsidiarity,” in which the state respects the independence and integrity of the associations within civil society and encourages, in conditions of freedom, the vitality and energy of collaborative endeavors between and among state and nonstate actors. Government is limited so that it cannot usurp the proper roles of the institutions of civil society, but it remains activist and moral, involved in a wide range of concerns within its public order function.⁵¹ Indeed, the state must be quite heavily involved, as “the common good requires a level of social justice and order that only state authority can ensure.”⁵²

Given the multiplicity of associations, civil society is characterized by “plural and particularist identities,”⁵³ among them mediating associations which are “essential to social stability, to a prudently limited state, and to the prospects for human flourishing.”⁵⁴ They mediate between the person and the state by gathering people of

50. See, e.g., John A. Coleman, *A Limited State and a Vibrant Society: Christianity and Civil Society*, in CIVIL SOCIETY AND GOVERNMENT, *supra* note 44, at 223, 238-42; Carmella, *Exemptions*, *supra* note 18, at 407-08, 443-44.

51. See generally Carmella, *Exemptions*, *supra* note 18, at 442-47; VISCHER, CONSCIENCE, *supra* note 48, at 104-05 (“Subsidiarity is . . . premised on the empowerment of individuals and groups to meet the needs around them, with the state acting, not as the primary locus of social action, but in a supportive, secondary role. This dispersal of social authority represents the ‘bottom up’ ordering of society in which needs are met, where possible, by the moral agents who are closest to them. . . . Only if the lower bodies cannot address a problem effectively should the higher bodies step in.”). John Courtney Murray and Jacques Maritain both thought the state-society distinction and subsidiarity (in the form of constitutional democracy and religious freedom) protected against totalitarianism. Angela C. Carmella, *Commentary: John Courtney Murray, S.J. (1904-1967)*, in THE TEACHINGS OF MODERN ROMAN CATHOLICISM ON LAW, POLITICS AND HUMAN NATURE 181, 189, 192-94 (John Witte Jr. & Frank S. Alexander eds., 2007) [hereinafter Carmella, *John Courtney Murray*].

52. VISCHER, CONSCIENCE, *supra* note 48, at 103. John Courtney Murray noted that

government, strictly speaking, creates nothing, that its function is to order, not to create. Perhaps more exactly, its function is to create the conditions of order under which original vitalities and forces, present in society, may have full scope to create the values by which society lives. Perhaps still more exactly, the only value which government *per se* is called upon to create is the value of order. But the value of order resides primarily in the fact that it furnishes [opportunities] for the exercise of . . . freedoms.

Carmella, *John Courtney Murray*, *supra* note 51, at 190 (quoting JOHN COURTNEY MURRAY, *Leo XIII and Pius XII: Government and the Order of Religion*, in RELIGIOUS LIBERTY: CATHOLIC STRUGGLES WITH PLURALISM 49, 78 (J. Leon Hooper, S.J. ed., 1993) [hereinafter RELIGIOUS LIBERTY]).

53. Rosenblum & Post, *Introduction*, *supra* note 44, at 3.

54. VISCHER, CONSCIENCE, *supra* note 48, at 101; see also Nancy L. Rosenblum, Amos: *Religious Autonomy and the Moral Uses of Pluralism*, in OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH, *supra* note 48, at 165 [hereinafter Rosenblum, *Religious Autonomy*].

shared values and views into a common identity, common voice, and common purpose, often one “shaped by members’ shared dictates of conscience.”⁵⁵ Religious associations play a particularly strong mediating role by providing these shared bonds of identity, expression, and purpose. As the Second Vatican Council’s Declaration on Religious Freedom recognized, “the social nature of man itself requires that he should give *external expression* to his internal acts of religion; that he should *participate with others in matters religious*; that he should *profess his religion in community*.”⁵⁶ Thus, for both religious and nonreligious associational life, the common bonds “empower[] citizens . . . to participate in projects that are bigger than themselves—a hallmark of a vibrant civil society.”⁵⁷

The state’s public order role will often place it in deep tension with associations in civil society, especially as government owes citizens a commitment to overarching public norms. Obviously, these tensions are required to ensure the balancing of freedom and responsibility, action and stability, diversity and order. The state cannot allow religious groups unfettered latitude; indeed, limits are often necessary for the preservation of their mediating role.⁵⁸ On the other hand, the state cannot act in ways that crush or absorb associations, or act in ways that so compromise identity, purpose, or expression as to remake the group in the state’s image. As it plays out in law, we see that a group’s shared bonds will always be in tension with the state to some degree. For instance, as to identity and autonomy, the right to exclude is not absolute. And as to purpose, access to resources for public-private projects can be conditioned. In the expressive context, the right of access to independent public spaces for the expression of views does not include privileged access or state promotion of one’s message. The relationship between state and nonstate actors is thus characterized by numerous tensions that promote associational diversity while maintaining the boundary between society and the state: nonstate groups, especially those with important mediating functions, are neither unaccountable nor captive to the state; the state is neither powerless nor omnipotent in its relation to groups; and individuals are neither subjugated to groups nor superior to them.⁵⁹

55. VISCHER, CONSCIENCE, *supra* note 48, at 138. He proposes these “three mediating ‘values’ that allow voluntary associations to serve as bridges between the individual and the state and that capture the essence of the benefits derived from associations by individual participants and the surrounding society.” *Id.* at 126.

56. *Declaration*, *supra* note 46, at 681 (emphasis added).

57. VISCHER, CONSCIENCE, *supra* note 48, at 103-04.

58. *See generally* Rosenblum, *Religious Autonomy*, *supra* note 54.

59. *See generally* VISCHER, CONSCIENCE, *supra* note 48, at 127-51 for examples of tensions in each of the three mediating values. While Professor Vischer focuses on those

These tensions are absolutely necessary with regard to religious freedom, where the independence of religious associations from the state is a constitutional norm. Indeed, the distinction between church and state is a hallmark of American political structure. Government's primary role in relation to religious associations is to protect responsible religious exercise.⁶⁰ It is not within the state's public ordering function to create vibrant religious life; that can only be done, if at all, by the associations within civil society, that realm of the particular and plural.⁶¹ The state has no theological function or sovereignty, is incompetent in matters of religious truth, and promotes no religious ideal or religious unity. It is a political sovereign with political function, promoting a civil unity through law;⁶² and though it is a moral actor, the state is nonsacral.⁶³ The

groups with controversial norms, it is clear that tensions exist even for groups with considerable overlap with public norms that are widely shared.

60. *Declaration*, *supra* note 46, at 687 (stating that the state's role is to ensure freedom "as far as possible, and curtailed only when and in so far as necessary"). As John Courtney Murray wrote, "The state [is] 'competent to do only one thing in respect of religion, that is, to recognize, guarantee, protect, and promote the religious freedom of the people. This is the full extent of [its] competence.'" Carmella, *John Courtney Murray*, *supra* note 51, at 194-95 (quoting RELIGIOUS LIBERTY, *supra* note 52, at 152). In contrast, "the care of religion, in so far as religion is an integral element of the common good of society, devolves upon those institutions whose purposes are religious." *Id.* (internal quotation marks omitted).

61. As John Courtney Murray explained, "It is religion itself, not government, which has the function of making society religious. The conditions favorable to the fulfillment of this function are conditions of freedom." Carmella, *John Courtney Murray*, *supra* note 51, at 205 (quoting John Courtney Murray, S.J., *The Issue of Church and State at Vatican Council II*, in RELIGIOUS LIBERTY, *supra* note 52, at 216-17). The Supreme Court has echoed this sentiment:

Under our constitutional scheme, the role of safeguarding our "religious heritage" and of promoting religious beliefs is reserved as the exclusive prerogative of our Nation's churches, religious institutions, and spiritual leaders. Because the Framers of the Establishment Clause understood that "religion is too personal, too sacred, too holy to permit its unhallowed perversion by civil [authorities]," the Clause demands that government play no role in this effort.

Lynch v. Donnelly, 465 U.S. 668, 725 (1984) (Brennan, J., dissenting) (internal citation omitted).

62. Civil unity is established "by the rule of law . . . and by the rule of law that serves as a framework for the orderly pursuit of a common good." Carmella, *John Courtney Murray*, *supra* note 51, at 225 (quoting JOHN COURTNEY MURRAY, *The Return to Tribalism*, in BRIDGING THE SACRED AND THE SECULAR: SELECTED WRITINGS OF JOHN COURTNEY MURRAY, S.J. 151-54 (J. Leon Hooper ed., 1993) [hereinafter BRIDGING THE SACRED AND THE SECULAR]).

63. See Carmella, *John Courtney Murray*, *supra* note 51, at 235 ("The function [of the state] is secular because freedom in society . . . remains a secular value—the sort of value that government can protect and foster by the instrument of law. Moreover, to this conception of the state as secular, there corresponds a conception of society itself as secular [I]n the secular society, under the secular state, the highest value that both state and society are called upon to protect and foster is the personal and social value of the free exercise of religion." (quoting John Courtney Murray, *The Declaration on Religious Freedom*, in BRIDGING THE SACRED AND THE SECULAR, *supra* note 62, at 192-93, 196)).

Religion Clauses themselves are what Jesuit philosopher and theologian John Courtney Murray called articles of peace, not articles of faith. They are intended to work together to protect religious freedom. “[T]hey ‘have no religious content. They answer none of the eternal human questions with regard to the nature of truth and freedom or the manner in which the spiritual order of man’s life is to be organized or not organized.’”⁶⁴ The clauses deprive the state of religious authority and opinion and provide a framework of law to protect religious freedom.

Indeed, the vibrancy of religious life in civil society depends on conditions of freedom, not on government support or promotion. While the state generally plays an important role in coordinating and assisting the groups of civil society as they promote the common good, the state “assists” religious associations primarily through protection of religious exercise.⁶⁵ Many kinds of “help” actually undermine the integrity of religious groups; recall that the Founders rejected an established church—funded by the state, with clergy appointed by the state and liturgy approved by the state—on the grounds that it impeded the religious freedom of churches as well as individuals. This insight has historical antecedents in a long line of evangelical and pietistic separationists, beginning with Roger Williams in the seventeenth century, who were passionately concerned that state involvement in religious affairs would corrupt religion.⁶⁶ Indeed, such an understanding was critical to the passage of the First Amendment. The separationists understood that the necessary tensions between church and state, which enable religious groups to function independently within a structure of temporal laws, would be relaxed in dangerous ways under an established church.

But in our complex legal and social world, maintaining these tensions to ensure religious freedom requires more than just “separation”—it requires that religious groups and the state remain in a relationship, but one that does not threaten the religious association’s mediating role and the shared bonds of identity, purpose, and expression that characterize that role. The state is limited, moral, and activist, and not simply an umpire or enforcer. Deciding the appropriate contours of the relationship on any given topic has become a major task of constitutional and statutory

64. *Id.* at 195 (quoting MURRAY, *supra* note 48, at 49).

65. The Declaration counsels that government should “show [religion] favor.” *Declaration*, *supra* note 46, at 680-81 ¶ 3. I adopt John Courtney Murray’s interpretation of this language: a nation “shows religion favor” by protecting its exercise by associations and individuals. Obviously in the U.S. there are many ways we show religion favor, as with religious exemptions from general laws, but they must always be connected to the promotion of religious freedom. See generally Carmella, *Exemptions*, *supra* note 18.

66. See generally ARLIN M. ADAMS & CHARLES J. EMMERICH, *A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES* (1990).

interpretation, where questions persist regarding whether religious conduct should sometimes be exempt from laws otherwise applicable to others, whether funding for education and social services should be available to religious groups and if so, on what conditions, and whether religious expression should be excluded from certain public spaces. Focusing on separation alone, rather than on real threats to the integrity of religious associations, is misguided and can easily result in hostility toward religion.

*B. State Appropriation of Theologically Significant Symbols:
Threatening the Mediating Role of Religious Associations*

Given my normative argument in favor of free exercise for religious groups and their members, my analysis of religious land use considers whether the church-state relationship promotes or threatens the mediating function of those groups. This question is relevant to religious use and symbolism on different kinds of property, private and public, because the church-state relationship should not harm the shared bonds of associational life or weaken the necessary tensions that promote it. Were we to focus only on the types of property, one might argue that religious land use and symbolism must belong on both private and public property because public property represents, and therefore should reflect, a citizenry that cherishes religious freedom and embraces many religious traditions. Others might argue instead that religion, as a dimension of the plural and particular of civil society, belongs only on private property and not on public property, which must be devoted to inclusive, secular norms. But in my view the analysis must be directed not simply to the nature of the property but also to the nature of the relationship between religious associations and the state. The mediating function of social groups is best preserved on private property and in independent public spaces like public forums because the government's involvement in their symbolic expression is circumscribed by law in those locations.⁶⁷ Especially in connection with theologically significant objects—those used for sacral or devotional purposes—the freedom to give symbolic voice to one's beliefs on one's own property or within a public forum is a fundamental aspect of both free exercise and free speech.

Private property, which provides “a setting within which individuals can exercise liberties . . . such as free speech, religious activity, and private family life, without undue government

67. This of course does not mean that government has no relationship to owners of private property or users of public forums. But in those contexts, there is an understanding that religious associations enjoy constitutional and statutory protections that restrain government regulation and that structure the relationship.

interference,”⁶⁸ has long been the primary locus for religious identity, purpose, and expression and has helped assure a degree of independence from the state when it comes to particular architectural statements and symbolism. Earlier in our history, religious property use was widely understood to be a dimension of religious exercise, but as land use controls have become more pervasive and as accountability in land use choices has grown, it has become necessary to make that connection explicit.⁶⁹ Houses of worship and other institutional religious land uses, as well as religious uses of residences, now receive some significant protections under various federal and state statutes and constitutions.⁷⁰ Symbolic religious expression on private property receives some legal protection as well.⁷¹ Indeed, courts and land use authorities are beginning to grasp the deeply semiotic function of religious architecture and religious symbols.⁷² So even though some major obstacles remain and a more consistent and comprehensive

68. JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 23 (2000). As an institution of civil society, private property should promote the common good, creating and supporting the social, economic, and political conditions that enable human development and flourishing. Property “secures individual autonomy from government coercion, prevents an over-concentration of political authority generally, and encourages investment and economic development.” Douglas W. Kmiec, *Property and Economic Liberty as Civil Rights: The Magisterial History of James W. Ely, Jr.*, 52 VAND. L. REV. 737, 737 (1999) (book review).

[P]roperty is itself merely a means to the protection of person and family and the freedom associated with both family life and economic initiative. . . . The private nature of property is protected not because ownership is a good in itself, but because it fulfills higher goods, including: the security against theft, civil disorder, and violence; the incentive to work and to find worth in that work and the efforts of others; and the development of neighborhoods that fulfill a deep and natural human yearning for community in both a social and political sense.

Id. at 753.

69. See Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-5(7)(B) (2006) (“The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.”); Carmella, *RLUIPA*, *supra* note 24, at 491-503.

70. See generally Carmella, *RLUIPA*, *supra* note 24; Carmella, *Religion-Free Environments*, *supra* note 24, at 99-102.

71. See generally Carmella, *Houses of Worship*, *supra* note 7; Carmella, *Religion-Free Environments*, *supra* note 24. See also *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), in which the Supreme Court struck down an ordinance that prohibited signs on one’s property as a violation of the Free Speech Clause. *Id.* at 58 (“A special respect for individual liberty in the home has long been part of our culture and our law; that principle has special resonance when the government seeks to constrain a person’s ability to *speak* there.” (internal citations omitted)). But size restrictions generally are permissible. See, e.g., *Trinity Assembly of God of Baltimore City, Inc. v. People’s Counsel for Baltimore Cnty.*, 962 A.2d 404 (Md. 2008); *St. John’s Evangelical Lutheran Church v. City of Ellisville*, 122 S.W.3d 635 (Mo. Ct. App. 2003); *Spriggs v. S. Stabane Twp. Zoning Hearing Bd.*, 786 A.2d 333 (Pa. Commw. Ct. 2001).

72. See, e.g., *E. Bay Asian Local Dev’t Corp. v. State*, 13 P.3d 1122 (Cal. 2000); *First Covenant Church v. City of Seattle*, 840 P.2d 174 (Wash. 1992); *Soc’y of Jesus v. Boston Landmarks Comm’n*, 564 N.Ed.2d 571 (Mass. 1990).

commitment to these values is needed, there is some recognition that the state should not have an exclusively aesthetic interest in the design of religious buildings and objects actively used by religious communities.⁷³

Religious exercise and expression of associations and individuals also occur on public property, historically located in spaces open to private speech known as “public forums.” Indeed, because the speech remains the expression of the entrant into the forum, identity, purpose, and voice are maintained. Such independent public spaces include the traditional public forum, like a park or plaza, and the specifically designated one, as when public facilities are made available to a wide range of groups for particular purposes.⁷⁴ Religious gatherings in traditional forums have a long history: in reaction to local government efforts to close public spaces to religious speakers, the Supreme Court made clear in a series of decisions in the 1940s and 50s that religious groups “were entitled to use city streets and parks for meetings and rallies” and for the distribution of religious literature.⁷⁵ In recent decades, governments again sought to close public spaces to religious speakers, this time in connection with designated forums. But the Court has been particularly active in defining the rights of religious groups to equal access to these spaces. Most cases involve transient uses of public space (holding meetings on a state university’s campus⁷⁶ and in public school facilities during nonschool hours⁷⁷), but free-standing temporary displays of religious symbols have also been upheld.⁷⁸ Recently, however, the Court agreed with local governments that even though a public park serves as a traditional forum for transient speech, it does not necessarily serve as a forum for permanent monuments, in recognition of the practical difficulties of limited space.⁷⁹

73. See cases cited *supra* note 72.

74. For a detailed discussion of the public forum doctrine, see *Daily v. New York City Housing Authority*, 221 F. Supp. 2d 390, 396-401 (E.D. N.Y. 2002).

75. JOHN T. NOONAN, JR. & EDWARD MCGLYNN GAFFNEY, JR., *RELIGIOUS FREEDOM: HISTORY, CASES, AND OTHER MATERIALS ON THE INTERACTION OF RELIGION AND GOVERNMENT* 375 (2001) (citing *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Poulos v. New Hampshire*, 345 U.S. 395 (1953)); see also *Marsh v. Alabama*, 326 U.S. 501 (1946); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

76. *Widmar v. Vincent*, 454 U.S. 263 (1981).

77. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

78. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); see also *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984) (park in which crèche was placed was considered a public forum, so message was private, nongovernmental speech), *aff’d by equally divided court*, *Bd. of Trs. v. McCreary*, 471 U.S. 83 (1985).

79. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009). There are such public forums, however, when there is enough space and sufficient political will: a park in California holds symbols of numerous associations representing many different faiths, new and old. Leslie C. Griffin, *Fighting the New Wars of Religion: The Need for a Tolerant First Amendment*, 62 ME. L. REV. 23, 71 (2010) (“Consider as a model the City of Mission Viejo,

Free-standing, temporary religious symbols in a public forum were found constitutional in *Capitol Square v. Pinette*.⁸⁰ In that case, the Ku Klux Klan requested permission to place a cross on the plaza in front of the Ohio State Capitol building (a traditional public forum) for a period of about two weeks.⁸¹ In a 7-2 decision, the Court upheld the inclusion of the Klan's cross in the forum as private expression, finding no unconstitutional endorsement.⁸² A plurality would not have applied the Establishment Clause at all; for them, this was simply private speech in a public forum protected under the Free Speech Clause.⁸³ The controlling concurrences, however, employed the endorsement test to ask whether the state's "actions (operating the forum in a particular manner and permitting the religious expression to take place therein), and their relationship to the private speech at issue, *actually convey* a message of endorsement."⁸⁴ The Court noted in dictum that endorsements included situations in which a "religious group may so dominate a public forum that a formal policy of equal access is transformed into a demonstration of approval."⁸⁵ Even the plurality conceded that a public forum could be manipulated in a way that allowed access only to certain religious groups, which would violate not only the Establishment Clause but

California, which added a Muslim holiday display to an intersection that already contained Jewish and Christian decorations. The following year officials at first cancelled the display because so many religious groups wanted to participate, but later found a park large enough to accommodate displays from the *ten to fifteen* groups that applied to mount their own distinctive *religious* symbols.").

80. *Capitol Square Review & Advisory Bd.*, 515 U.S. 753 (1995).

81. *Id.* at 758.

82. *Id.* at 769-70.

83. "The State did not sponsor respondents' expression, the expression was made on government property that had been opened to the public for speech, and permission was requested through the same application process and on the same terms required of other private groups." *Id.* at 763. "Religious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms." *Id.* at 770.

84. *Id.* at 777 (O'Connor, J., concurring). Justice O'Connor elaborated:

Where the government's operation of a public forum has the effect of endorsing religion . . . the Establishment Clause is violated. This is so not because of "transferred endorsement" or mistaken attribution of private speech to the State, but because the State's own actions (operating the forum in a particular manner and permitting the religious expression to take place therein), and their relationship to the private speech at issue, *actually convey* a message of endorsement. At some point, for example, a private religious group may so dominate a public forum that a formal policy of equal access is transformed into a demonstration of approval . . . Other circumstances may produce the same effect—whether because of the fortuity of geography, the nature of the particular public space, or the character of the religious speech at issue, among others.

Id. at 777-78 (O'Connor, J., concurring) (internal citations omitted).

85. *Id.* at 777. Justice Souter's concurrence discussed "the possibility of affixing a sign to the cross adequately disclaiming any government sponsorship or endorsement of it." *Id.* at 784 (Souter, J., concurring).

the Free Speech Clause as well.⁸⁶ It is clear, though, that both the plurality and concurrences agreed that government could not manage the forum in a way that would allow a group to monopolize or enjoy privileged access to the space.⁸⁷

Thus, on private property and within independent public spaces, religious groups (as well as other entities and individuals) are able to express their beliefs in ways that are largely independent of government involvement.⁸⁸ When private expression retains its integrity, various tensions are maintained, namely tensions between the state and the association, tensions among various associations in civil society, and tensions between the association and nonmembers.⁸⁹ This allows religious associations their mediating functions. Most importantly, among the multiplicity of differing messages, church and state do not share a theological proclamation. There is no confusion regarding the identity of the speaker; the voice is that of the religious association.

Contrast this church-state relationship with the one that emerges when theologically significant symbols are offered and placed on government property. A new element not present in the private property/public forum contexts enters the picture: state acceptance of the symbol, which signals government adoption of the expression.⁹⁰ If a court finds, based upon factors to be described later, that the

86. *Id.* at 766 (“Of course, giving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter) would violate the Establishment Clause (as well as the Free Speech Clause, since it would involve content discrimination). And one can conceive of a case in which a governmental entity manipulates its administration of a public forum close to the seat of government (or within a government building) in such a manner that only certain religious groups take advantage of it, creating an impression of endorsement *that is in fact accurate*.”).

87. This outcome is consistent with Professor Vischer’s argument that to “facilitate the mediating value of expression, courts must ensure . . . associations’ access to any public forum established by the government.” VISCHER, *CONSCIENCE*, *supra* note 48, at 135.

88. Of course private property is regulated by zoning ordinances, and public forums are regulated in time, place, and manner. Zoning and other kinds of land use controls can indeed involve government in religious decisions, especially when religious design (and therefore religious expression) is affected. Such involvement, in my view, is illegitimate. *See generally* Carmella, *Houses of Worship*, *supra* note 7. But for the most part, zoning is a legitimate mechanism to protect surrounding neighbors from secondary harms; when applied in accordance with RLUIPA standards, zoning reflects an appropriate church-state relationship. Within a public forum, government cannot discriminate based upon content or viewpoint; but time, place, and manner restrictions, which are constitutionally permitted, do not involve the state in religious decisions.

89. Indeed, the tensions may be heightened in the forum, where different symbols representing opposing claims can be juxtaposed. Some mediating groups may decide not to participate in a forum because of the challenge from other groups’ messages; see *infra* notes 194-196 and accompanying text. But a public forum can provide an opportunity to engage in forms of symbolic discourse not possible on private property, as when a group of local churches placed multiple crosses on the statehouse plaza in direct response to the Klan’s abomination of the symbol. *See* Capitol Square Review & Advisory Bd., 515 U.S. at 783, 792 (Souter, J., concurring).

90. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1134 (2009).

symbol indeed conveys an intact religious message, then the court will determine this to be unconstitutional governmental sponsorship, affiliation, support, or promotion—that is, “endorsement” of the religious meaning the group ascribes to the symbol. But the Supreme Court’s jurisprudence, which guides lower courts on these cases, completely ignores what I consider to be the most significant rationale for this determination: the negative *effects* of state involvement *on the donors* (as well as on those who share their intended meaning). Their expression is diluted and their important societal functions are compromised.

The negative impacts involve the reduction in critical tensions that sustain associational diversity and mediating function. When one religious message is promoted in closed government spaces, the state takes on the religious voice.⁹¹ Contrary to what some might think, this governmental appropriation of religion does not contribute to the vibrancy of associational life or expression and certainly does not empower the religious group that embraces the symbol. Once the state adopts a particular theologically significant symbol, tensions necessary to the mediating function of groups in civil society are relaxed. One religious group now has state power behind its symbolic expression, which corrodes the necessary distinction between state and church, threatening a collapse of identity and voice and destroying the independence of the association. Once one religious message is privileged, the tensions are broken that would otherwise sustain open access for multiple voices to independent public spaces. Further, the interaction among religious associations in society

91. Professor Vischer has made these observations in the context of speech (specifically, prayer) and has concluded that “religious messages should not be given access to a forum that is closed to competing messages.” VISCHER, CONSCIENCE, *supra* note 48, at 137. He writes,

[M]eaningful application of the Establishment clause . . . demands that government-controlled spaces not be captured by any single religious message or messenger. To do so eviscerates the mediating function of religious associations by giving a single messenger (whether an individual or group) a state trump over competing messengers, negating the tension that is key to their mediating role [When government] grant[s] access to a single religious message, [it] effectively becom[es] the vehicle for the expression of a particular religious message into a forum . . . not open to other religious (or nonreligious) messages. Allowing the government to co-opt a message that could otherwise be expressed in other ways by religious groups does not enhance the vitality or viability of associations. If anything, it diminishes associations. This diminishment takes two forms. First, the government-sanctioned expression renders moot the mediating function of some associations to the extent their message is already communicated in the government-controlled forum. Second, it negates the mediating function of other associations to the extent their message is trumped by the government’s adoption of a competing message.

Id.

becomes distorted, because the state has appropriated the voice of one and not others, thereby threatening the mediating role for all groups—those that share the message and those that do not. By asserting theological competence, the state has exceeded its proper roles in maintaining public order, coordinating nonstate groups toward the common good, and assisting them in these efforts.

The appropriation of religious messages also threatens another important function of religious groups: limiting the state and maintaining the boundary between civil society and the state.⁹² Dissenting religious groups that demanded disestablishment during the founding period, concerned that state sponsorship weakens and corrupts religion, were especially afraid to lose this function of churches.⁹³ Religious groups limit the state not only by their existence but also by prophetic critique of the state and its authoritarian tendencies.⁹⁴ Government co-optation of the messages of some religious groups practically ensures that they will be less vibrant messengers in society, making it much harder for them to be critical of government. Thus, when the state promotes a religious message,

[b]lurring the line between associational and governmental interests not only makes it more difficult for the government to pursue its own proper interests within the moral marketplace, but, ultimately, it eviscerates the association's capacity to function as a vehicle for conscience by turning it into an arm of the state.⁹⁵

Though the Court does not view the issues from the perspective of associational health in civil society, it has obviously recognized that something is wrong when the state takes on the religious expression of a nonstate actor. But the Court's corrective is even worse. The

92. See, e.g., Carmella, *Exemptions*, *supra* note 18, at 409-12.

93. They made these arguments:

(1) that to be genuine in one's faith, religious belief and practice must be voluntary; (2) that establishment subordinates the church to the state, thus yielding jurisdiction over religious doctrine and governance for which the civil state is wholly without competence; (3) that establishment has a corrupting effect on the church and its clerics; (4) that as an institution that mediates between the state and the people, the churches presume to sit in judgment over, and thereby help limit, the state and its authoritarian pretensions; (5) that only a free and independent church will successfully exercise its prophetic voice and critique the state, a role important to limiting the state; (6) that a civil government that treats religions unequally will cause jealousy [sic] and resentments within the body politic; (7) that religion, if vibrant and respected, can help temper selfish passions and oppressive tendencies and thus protect against harmful swings in popular sentiment to which republics are vulnerable; and (8) that religion, when perverted into a civil religion, collapses two very different and very powerful allegiances, risking a dangerous confounding of God and country, faith and nationalism.

Esbeck, *supra* note 19, at 1581.

94. See *id.*

95. VISCHER, CONSCIENCE, *supra* note 48, at 138.

Establishment Clause, as currently interpreted, demands that the religious message be changed—that is, secularized or minimized, typically by placement of the symbol. By desacralizing the symbol, the state has sufficiently broken the link between the donor's expression and what is now government expression, reflecting its own purposes and values. Indeed, the state must contextualize the symbol to ensure that it will be perceived in nonreligious terms by some judicially constructed observer. Thus, government is constitutionally required to redefine theologically significant symbols as having a predominant nonreligious meaning, at least in that particular place. The law requires government to create a secular tableau that speaks of pluralism or civic morality, while depriving the religious speaker within the tableau of the ability to speak independently. The resulting relationship between religious groups and the state subordinates, indeed negates, the tensions that sustain the shared bonds of identity, voice, and purpose necessary for any group's mediating function. In my view, it is far worse for government to change a religious message than to affiliate with it. Rather than privileging a religious message, the state deconstructs and reconstructs it as government speech. Government has no power to do this, and yet the Court reads the Constitution to require it.⁹⁶

Based on the multiple interpretations generated under the endorsement inquiry, symbols loaned for temporary display are redefined, depending upon placement, context, and other factors.⁹⁷ With respect to symbols donated for permanent display, a slightly more complex analysis is employed. First, government engages in "selective receptivity;" that is, it has discretion to accept or reject the donor's message.⁹⁸ Acceptance means that the state is willing to be associated with the donor group's message; yet immediately upon acceptance, the donor's message is terminated, and the expression becomes governmental.⁹⁹ But even determining the donor's message

96. See *infra* Part III.B.

97. See *infra* notes 120-129 and accompanying text discussing *Lynch v. Donnelly*, 465 U.S. 668 (1984) and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

98. When government officials are deciding whether to accept a symbol that has been offered, they "select the monuments that portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture." *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1134 (2009).

99. In *Pleasant Grove City*, the Supreme Court noted:

Just as government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land. It certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated. And because property owners typically do not permit the construction of such monuments on their land, persons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner's behalf

is difficult;¹⁰⁰ and even if the message could be determined at the time of acceptance, the donor's meaning and the state's meaning can diverge over time, as well as due to placement and context.¹⁰¹ It might also change over time with the addition of other objects in the vicinity and with the addition of interpretive commentary.¹⁰² Once the symbol becomes government speech, there is no guarantee that the donor's message will continue; indeed, given the Establishment Clause jurisprudence, a donor's religious message should *not* continue. Permanent displays, then, like temporary ones, must involve secularization or minimization of religious meaning.

My concern is not that the religious group has lost control of its intended message. Whenever one employs symbols for expression, there is no guarantee that the meaning viewers receive will be the same as what the speaker intended. Rather my concern is the resulting church-state relationship and the broader societal implications. The Court fails to acknowledge the *negative impacts* on religious associations: government promotion of religious messages impairs the tensions necessary to sustain the groups' mediating and limiting roles. Further, government transformation of religious messages requires an even more distorted relationship between associations and the state, one in which the state substitutes its own meaning of religious symbols that would not have been placed on public property but for the action of a nonstate association.

Is there a way to keep intended messages intact on public property without involving government in the sponsorship or

...
 ... The monuments that are accepted . . . are meant to convey and have the effect of conveying a government message, and they thus constitute government speech.

Id. at 1133-34.

100. The Court specifically rejected the notion that

a monument can convey only one "message" . . . [i.e.,] the message intended by the donor

...
 ... [T]ext-based monuments are almost certain to evoke different thoughts and sentiments in the minds of different observers, and the effect of monuments that do not contain text is likely to be even more variable. . . .
 ... [I]t frequently is not possible to identify a single "message" that is conveyed by an object or structure, and consequently, the thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor.

Id. at 1135-36. This is especially the case when symbols are financed by many separate donors.

101. When the state accepts a privately donated monument and places it on public property, it engages in expressive conduct, but "does not necessarily endorse the specific meaning that any particular donor sees in the monument." *Id.* at 1136. The message conveyed might be "altered by the subsequent addition of other monuments" and "may change over time." *Id.*

102. *Id.* at 1136-37; see *infra* notes 159-162 and accompanying text.

transformation of those messages—as is possible on private property and in public forums?¹⁰³ Such expressive integrity and independence is critical to sustaining the multiplicity of societal and state tensions that create associational diversity. Or is the state's control over the management of its own property so extensive that its involvement in expression is inevitable?¹⁰⁴ Perhaps outside the context of a donation of symbols we might be able to conceive of a more capacious understanding of independent public spaces, for instance, recognizing some public property to serve as *de facto* public forums. I would venture to guess that private groups often think they continue to speak through their symbols, even when those objects are not placed in a traditional or designated forum. Indeed, there may be many instances in which groups displaying symbols have no intention of asking for government approval of their message or of ceding their message to the state.¹⁰⁵ We explore these questions more thoroughly in Part IV. But first we turn to an analysis of the Establishment Clause jurisprudence to document more closely how we have gotten to where we are.

III. THE RELIGIOUS SYMBOLS JURISPRUDENCE

As we see from the normative argument presented, a critical element of religious freedom in civil society is ensuring the integrity and independence of all associations—especially religious groups—that mediate between the individual and the state. These groups provide their members with a common identity, purpose, and voice, and help build the social connections necessary for meaningful existence. This role places them in deep tension with the state, as well as with other associations and nonmembers, and even to some degree with their own members.¹⁰⁶ Whether or not their goals are controversial or compatible with those of the state, religious associations enjoy varying degrees of independence, and by their existence and critique, help to limit governmental power. In

103. Recall the discussion in the Introduction concerning the fact that while the meaning cannot be controlled, the religious group will nonetheless attempt to proclaim its beliefs symbolically. Retaining the connection between the speaker and the proclamation is what is meant by “keeping an intended message intact.”

104. Whether public property “by law or tradition [has] been given the status of a public forum, or rather has been reserved for specific official uses” is significant. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). For a critique of the state's excessive control over its property, especially regarding public forums, see generally Timothy Zick, *Property, Place, and Public Discourse*, 21 WASH. U. J.L. & POL'Y 173, 175 (2006) [hereinafter Zick, *Property, Place, and Discourse*]; Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581, 583-84 (2006) [hereinafter Zick, *Speech and Spatial Tactics*]; Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 GEO. WASH. L. REV. 439, 444-48 (2006) [hereinafter Zick, *Space, Place, and Speech*].

105. See *infra* notes 167-170 and accompanying text.

106. See Robert K. Vischer, *The Good, the Bad and the Ugly: Rethinking the Value of Associations*, 79 NOTRE DAME L. REV. 949, 1020-21 (2004).

respecting the boundary between civil society and the state, and recognizing both the limits of its own authority and the mediating role of religious groups, the state plays no role in the creation of religious identity among the citizens or the promotion of a religious message; instead, its public ordering and coordinating roles provide a legal structure in which religious groups create their own identities and promote their own messages.¹⁰⁷

That freedom for creating and sustaining religious associations involves, in part, protecting *locations* for religious exercise. Shared religious bonds have to be cultivated in a particular place, and in the United States, that usually occurs on private property; public spaces dedicated to free speech serve as additional (though sometimes exclusive) outlets for religious exercise. The bodies of statutory and constitutional law associated with these kinds of properties acknowledge that the relationship between religious groups and their individual members on the one hand, and government on the other, can indeed be harmful to groups. On private property, government regulation prohibiting construction of a house of worship without sufficient justification is clearly understood to harm the communal aspects of religious exercise. In public forums, government discrimination against religious groups is clearly understood to affect rights of associations.

But the Supreme Court's jurisprudence of religious symbols on *public property* does not acknowledge the possibility of harm to the mediating and limiting functions of religious groups that loan or donate symbols for display and to those other groups that share those symbols. The Court also fails to recognize the specific harmful effects on their private expression when government sponsors their messages *and* when government transforms their messages for its own purposes, with its own meaning. Finally, the Court offers no attempt to coordinate the bodies of law associated with religion on private property, in public forums, and on public property. Yet without this coordination, how can we ensure fidelity to the overarching constitutional design that protects vibrant religious life in civil society?

A. Ignoring Religious Associations and their Messages

The Establishment Clause is often said to embody values of neutrality, separation, and equality; they are actually instrumental values in service to the ultimate goal of religious freedom.

107. The complexities of the processes by which religious groups actually negotiate their identities with members, nonmembers and social institutions are obviously beyond the scope of this Article. For a description see generally Symposium, *Law, Religion, and Identity*, 26 LAW & SOC. INQUIRY 1 (2001); Winnifred Fallers Sullivan & Frank E. Reynolds, *Symposium Introduction: Law, Religion, and Identity*, 26 LAW & SOC. INQUIRY 1 (2001).

Emphasizing these values in isolation obscures the powerful freedom-enhancing impacts of disestablishment.¹⁰⁸ As Justice O'Connor has acknowledged, both the Establishment Clause and the Free Exercise Clause are about freedom:

Reasonable minds can disagree about how to apply the Religion Clauses in a given case. But the goal of the Clauses is clear: to carry out the Founders' plan of preserving religious liberty to the fullest extent possible in a pluralistic society. By enforcing the Clauses, we have kept religion a matter for the individual conscience, not for the prosecutor or bureaucrat. At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish. The well-known statement that "[w]e are a religious people" has proved true. Americans attend their places of worship more often than do citizens of other developed nations, and describe religion as playing an especially important role in their lives.¹⁰⁹

The Establishment Clause has been interpreted to place numerous structural restraints on government, all of which protect religious freedom for associations as well as individuals.¹¹⁰ Most fundamentally, the state cannot assume or absorb religious functions because it is not competent in theological or ecclesiastical matters. Indeed, this is the most obvious meaning of "separation of church and state."¹¹¹ The state cannot privilege some religious groups with favored status; nor is it competent to sponsor devotional exercises¹¹² or religious instruction,¹¹³ to proclaim religious truth¹¹⁴ or compel professions of faith.¹¹⁵ Mediating associations in society—like families

108. See, e.g., *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring) ("[U]ntutored devotion to the concept of neutrality can lead to . . . hostility to the religious" (quoting *Sch. Dist. v. Schempp*, 374 U.S. 203, 306 (1963))).

109. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 881 (2005) (O'Connor, J., concurring) (internal citations omitted).

110. Under the Establishment Clause, "government may not promote or affiliate itself with any religious doctrine or organization, . . . may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs." *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 591 (1989).

111. See, e.g., *Bd. of Educ. v. Grumet*, 512 U.S. 687 (1994); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982); OLIVER O'DONOVAN, *THE DESIRE OF NATIONS: REDISCOVERING THE ROOTS OF POLITICAL THEOLOGY* 244 (1996) (separation of church and state as "an uncommunicative formula, to be sure, since those words assert nothing that could have perturbed the most traditional apologist for dual jurisdiction in Christendom").

112. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 307 (2000); *Lee v. Weisman*, 505 U.S. 577, 586-88 (1992); *Schempp*, 374 U.S. at 223; *Engel v. Vitale*, 370 U.S. 421, 424 (1962).

113. *Edwards v. Aguillard*, 482 U.S. 578, 588-89 (1987); *Stone v. Graham*, 449 U.S. 39, 42 (1980); *McCullum v. Bd. of Educ.*, 333 U.S. 203, 210 (1948).

114. *United States v. Ballard*, 322 U.S. 78, 87 (1944).

115. *Torcaso v. Watkins*, 367 U.S. 488, 491-92 (1961).

and religious groups—are charged with these tasks.¹¹⁶ At the same time, “[a] secular state, it must be remembered, is not the same as an atheistic or antireligious state. . . . [T]here is no orthodoxy on religious matters in the secular state.”¹¹⁷ It makes sense, then, that in addition to the structural restraints, the state also has an affirmative duty to protect religious freedom and to recognize the presence of religion in society. These affirmative protections also benefit groups as well as individuals.

Specific restraints with respect to religious use and symbolism on public property can be understood as protections for mediating groups in some contexts. For instance, if government cannot preach or teach religion, then the state cannot have its own architectural or symbolic expressions of religion like its own house of worship on government land or a theological symbol affixed to the dome of the statehouse.¹¹⁸ Instead, the state must ensure freedom for the symbolic expression of groups and individuals on private property and in independent public spaces. If the state cannot privilege some religious groups over others, then it cannot sponsor or promote a group’s expression on government property. Instead, the state is obligated to secure the freedom of private expression for those groups on private property and in independent public spaces. These themes are not so clear, however, in the religious symbols jurisprudence.

The Supreme Court’s symbols cases are divided into seasonal and permanent displays. The first two decisions, from the 1980s, involved challenges brought by the American Civil Liberties Union to Christmas crèches and a Chanukah menorah. In *Lynch v. Donnelly*, the City of Pawtucket, Rhode Island, together with the local merchants association, sponsored a large Christmas season display in a privately owned park in the center of the shopping district.¹¹⁹ All of the many figures in the display—which included Santa’s house, reindeer and sleigh, candles, stars, poles, live as well as painted cut out evergreens, a talking wishing well, musician figures, and nativity scene—were owned by the City.¹²⁰ The Pawtucket crèche was held not

116. *Schempp*, 374 U.S. at 226 (“The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind.”).

117. *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 610-11 (1989).

118. And conversely, *allowances* for religious use and symbolism on public property are typically tied to the promotion of religious freedom, as with government cemeteries in which religious grave markers can be chosen by families, and chapels found in prisons, military installations, and government owned airports. Even spaces like the U.S. Senate Chapel are justified as accommodating the free exercise of religion for government employees.

119. *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984).

120. *Id.* (“Each year, in cooperation with the downtown retail merchants’ association, the City of Pawtucket, R.I., erects a Christmas display as part of its observance of the Christmas holiday season. The display is situated in a park owned by a nonprofit organization and located in the heart of the shopping district.”). For an excellent discussion of the

to violate the Establishment Clause. Five years later, *Allegheny v. ACLU* involved both a crèche (owned by the Holy Name Society, a Catholic organization)¹²¹ and a menorah (owned by Chabad, a Jewish organization),¹²² both of which were donated for display in Pittsburgh. The Pittsburgh crèche was placed inside the Allegheny County Courthouse alone at the top of the Grand Staircase,¹²³ and the eighteen-foot tall menorah was placed on the steps outside the City-County Building alongside a 45-foot tall Christmas tree and sign that read “Salute to Liberty.”¹²⁴ The menorah was held not to violate the Establishment Clause, but the Pittsburgh crèche was found to constitute government endorsement of a religious message.¹²⁵

Justice O'Connor introduced her endorsement test in her concurrence in *Lynch*. Chief Justice Burger wrote the majority opinion, which deemed the crèche to be a passive symbol that noted the origins of Christmas.¹²⁶ In Justice O'Connor's language, the reasonable observer would view the crèche as part of “the celebration of the public holiday through its traditional symbols.”¹²⁷ She and Justice Blackmun later distinguished the *Lynch* crèche from the courthouse crèche in their controlling concurrences in *Allegheny*.¹²⁸ There, they thought a reasonable observer would understand the Pittsburgh courthouse display to be sending a “message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political

decision, see WINNIFRED FALLERS SULLIVAN, PAYING THE WORDS EXTRA: RELIGIOUS DISCOURSE IN THE SUPREME COURT OF THE UNITED STATES 53 (1994) (noting that the multiplicity of objects in the display “[t]o a student of religion . . . is a motherlode of sacred objects”).

121. *Cnty. of Allegheny*, 492 U.S. at 579. (“Since 1981, the county has permitted the Holy Name Society, a Roman Catholic group, to display a crèche in the county courthouse during the Christmas holiday season.”).

122. *Id.* at 587 (“The menorah is owned by Chabad, a Jewish group, but is stored, erected, and removed each year by the city.”).

123. *Id.* at 579-80.

124. *Id.* at 581-82.

125. *Id.* at 621.

126. *Lynch v. Donnelly*, 465 U.S. 668, 685 (1984). Chief Justice Burger does not deny the religiousness of the holiday, admitting that all the Christmas symbols “recall the religious nature of the Holiday.” *Id.* Because it is no secret that the decorations celebrate Christmas, and the crèche symbolizes the origins of that holiday, no constitutional violation has occurred. “In our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach [to Establishment Clause interpretation] is simplistic and has been uniformly rejected by the Court.” *Id.* at 678.

127. *Id.* at 691 (O'Connor, J., concurring). “Although the religious and indeed sectarian significance of the crèche . . . is not neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display The display celebrates a public holiday” *Id.* at 692.

128. *Cnty. of Allegheny*, 492 U.S. at 598 (“This praise to God in Christian terms is indisputably religious—indeed sectarian—just as it is when said in the Gospel or in a church service.”).

community.”¹²⁹ As to the menorah, O’Connor and Blackmun could not agree on its meaning. O’Connor said unequivocally that it was a religious symbol, but Blackmun’s opinion suggested it had been secularized. They did agree, though, that the placement of the menorah next to a Christmas tree and patriotic sign meant that it would be understood by the reasonable observer to be a celebration of pluralism.¹³⁰

Nearly two decades later, the Supreme Court issued two more decisions, both involving Ten Commandments displays. In *McCreary County v. ACLU*, the ACLU challenged three consecutive displays inside the county courthouse: the first contained only the Ten Commandments; a second display placed other documents that contained religious references alongside the Ten Commandments; a third replaced the second, and included a mix of documents “significant in the historical foundation of American government” along with the Ten Commandments.¹³¹ In *Van Orden v. Perry*, a citizen challenged a six-foot tall granite monument located in the park in front of the Texas capitol building that had been donated by the Eagles, a civic organization, forty years earlier.¹³² Seventeen monuments and twenty-one historical markers were also permanently displayed in the park.¹³³ In decisions issued the same day, the Court found the displays in *McCreary* unconstitutional,¹³⁴ but held the monument in *Van Orden* permissible.¹³⁵

Justice Souter’s opinion for the majority in *McCreary* employed the endorsement analysis, but focused on the lack of a secular purpose for any of the displays.¹³⁶ Justice Breyer’s controlling concurrence in *Van Orden* used not the endorsement inquiry but rather a test of “legal judgment.” For him, this particular Ten Commandments monument in its nonsacral setting was primarily civic in nature. Troubled by the social disruption and religious conflict that would result from ordering its removal (and by

129. *Id.* at 595 (quoting *Lynch*, 465 U.S. at 688).

130. *Id.* at 621.

131. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 871 (2005).

132. *Van Orden v. Perry*, 545 U.S. 677, 682 (2005). The Eagles had donated many such monuments to governments throughout the nation as part of its campaign against juvenile delinquency in the mid-to-late twentieth century. The state accepted donation of the monument from the Eagles, “a national social, civic and patriotic organization.” *Id.* The state then selected the site, while the Eagles paid costs of erecting the monument.

133. *Id.* at 681.

134. *See McCreary*, 545 U.S. at 881.

135. *Van Orden*, 545 U.S. at 691-92.

136. *McCreary*, 545 U.S. at 860 (The display “sends the . . . message to . . . nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members” (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000) (internal quotation marks omitted))).

implication hundreds like it throughout the nation), he did not find a sufficient threat to religious freedom to justify those consequences.¹³⁷

Absent from these decisions is any concern for negative impacts on the donors (and other mediating groups that share their messages) and on the messages themselves.¹³⁸ The Holy Name Society proclaimed its beliefs through the crèche in *Allegheny*; Chabad signaled its faith through the menorah in *Allegheny*; the Order of Eagles spoke of its commitment to young people through its Ten Commandments monument at the Texas statehouse in *Van Orden*. What were the effects on these groups and countless others like them that loaned or donated religious symbols for display on public property? Several of the justices described the groups, but only to the extent useful for interpreting the content of the message conveyed. Yet the cases only occasionally mention the impacts of government use of religious symbols on religious freedom generally, and never in connection with the health or vitality of the groups that bring their symbolic expression to public property. Even Justice O'Connor, who squarely acknowledges the connection between restraints on government use of religious symbols and religious freedom, does not acknowledge that the very groups whose religious messages are communicated on public property might suffer co-optation and dilution of their messages within and among associational life in civil society.¹³⁹ A focus on these issues would have led to the question of

137. Justice Breyer was concerned with the repercussions of razing not just this monument but the hundreds of similar monuments donated by the Eagles that would result from a holding of unconstitutionality. Ordering the "removal of longstanding depictions of the Ten Commandments from public buildings across the Nation . . . could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden*, 545 U.S. at 704. The Establishment Clause "does not compel the government to purge from the public sphere all that in any way partakes of the religious. Such absolutism is not only inconsistent with our national traditions, but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid." *Id.* at 699 (internal citations omitted).

138. In *McCreary*, officials themselves constructed the displays containing the Ten Commandments. While this affects groups that share this theologically significant symbol, there was no donor group involved, as in *Allegheny* and *Van Orden*. In *Lynch*, the analysis is a bit more complex. Pawtucket had sponsored the Christmas display from the 1940s to the 1970s in a park on the city's periphery. In 1973 the City moved it to the privately owned park in the center city "to give a boost to downtown merchants who had lost business to the shopping malls in a time of economic recession." SULLIVAN, *supra* note 120, at 51. The merchants' association became a co-sponsor of the display. It may fairly be said that the merchants' association, while not a donor, was involved in the display and its message, because of the very long history of church-commercial cooperation on "Keeping Christ in Christmas." This relationship, which developed throughout the late nineteenth and early to mid-twentieth century is detailed in a fascinating book by LEIGH ERIC SCHMIDT, *CONSUMER RITES: THE BUYING AND SELLING OF AMERICAN HOLIDAYS* (1995). Though the mayor of Pawtucket made "Keeping Christ in Christmas" a rallying cry during the *Lynch* litigation, the business community had developed this movement in collaboration with religious groups long before government got involved.

139. Under the Religion Clauses, concern for the vibrancy of religious associations has typically been confined to these contexts: funding of religious education (particularly in the

whether the public crèche displays might have diluted the vibrancy and meaning of private crèche displays elsewhere, and whether similar dilution might have occurred in connection with the private displays of the menorah and Ten Commandments as well.

Instead of attending to the freedom and integrity of nonstate actors in civil society, the Court has produced three broad approaches to religious symbols adjudication that have their own emphases and purposes. Pluralities in both *Allegheny*¹⁴⁰ and *Van Orden*¹⁴¹ proposed per se rules to govern this area which would result in little policing by federal courts of displays and monuments and greater deference to local governments. They would have upheld both the crèche and the menorah in *Allegheny* and the Ten Commandments displays in *McCreary* as well as *Van Orden*. Convinced that “[t]he ability of the organized community to recognize and accommodate religion in a society with a pervasive public sector requires diligent observance of the border between accommodation and establishment,”¹⁴² Justice Kennedy articulated the position in *Allegheny*: courts should prohibit only those symbols the government seeks to use for proselytization or coercion of religious faith. If “[p]assersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs,” then they are merely passive symbols that cause no harm.¹⁴³ A display can still be coercive, even if no legal penalties are involved. Kennedy writes,

I doubt not, for example, that the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall. . . . [S]uch an obtrusive year-round religious display would place the government’s weight behind an obvious effort to proselytize on behalf of a particular religion.¹⁴⁴

Justice Scalia has gone the furthest of any member of the Court to state an affirmative vision of allowable religious symbols on public property. In his *McCreary* dissent, he reiterates and extends a theme developed in other decisions: citizens should be able to experience religious symbols and exercises “as a people.”¹⁴⁵ While some symbols

1970s and 80s when it was thought that the mission of religious schools was highly vulnerable to corruption by state regulation that would accompany state funding), civil adjudication of religious claims (the “church autonomy” decisions), and impediments to the conscience claims of religious groups (although after *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 890 (1990), this concern has lost its traction).

140. Chief Justice Rehnquist and Justices Kennedy, Scalia, and White.

141. Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas.

142. *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 659 (1989).

143. *Id.* at 664.

144. *Id.* at 661. Justice Kennedy is particularly wedded to the notion that no one should be coerced (even psychologically) into religious practice. *See also Lee v. Weisman*, 505 U.S. 577, 592 (1992).

145. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 900 (2005) (Scalia, J., dissenting) (“On the one hand, the interest of that minority [adherents of nonwestern faiths and nonbelievers]

cannot serve this function because they are not widely shared,¹⁴⁶ he considers the Ten Commandments to be broadly nondenominational, revered by and representing three great monotheistic faith traditions (Judaism, Christianity and Islam), which make up nearly 98% of the nation's religious demographic.¹⁴⁷

In sharp contrast to this openness regarding religion on public property, Justice Stevens (joined after a time by Justice Ginsburg) would prohibit all religious symbols—crèche, menorah, Ten Commandments, and other symbols. He is concerned that mixing government and religion corrupts religion, but he is no evangelical separationist. His primary focus is on the psychological impacts—framed as “being offended”—that viewers experience, not only for those who do not share the symbol but especially for those who do.¹⁴⁸ Writing in *Allegheny*, he said,

In my opinion the Establishment Clause should be construed to create a strong presumption against the display of religious symbols on public property. There is always a risk that such symbols will offend nonmembers of the faith being advertised as well as adherents who consider the particular advertisement disrespectful. Some devout Christians believe that the crèche should be placed only in reverential settings, such as a church or perhaps a private home; they do not countenance its use as an aid to commercialization of Christ's birthday. In this very suit, members of the Jewish faith firmly opposed the use to which the menorah was put by the particular sect that sponsored the display¹⁴⁹

The most influential author in the symbols opinions has been Justice O'Connor, whose endorsement test—though rejected by the pluralities and amended significantly by Justice Stevens¹⁵⁰—has been an important influence among other colleagues and has become the predominant test used by lower courts. The test, announced in her

in not feeling 'excluded'; but on the other, the interest of the overwhelming majority of religious believers in being able to give God thanks and supplication *as a people*, and with respect to our national endeavors. Our national tradition has resolved that conflict in favor of the majority.”).

146. A common faith excludes “details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ).” *Lee*, 505 U.S. at 641 (Scalia, J., dissenting).

147. *McCreary*, 545 U.S. at 894.

148. See *infra* note 154 and accompanying text. Justice Brennan also expressed concern over offense “to those for whom the crèche has profound significance.” *Lynch v. Donnelly*, 465 U.S. 668, 712 (1984) (Brennan, J., dissenting).

149. *Cnty. of Allegheny*, 492 U.S. at 650-51 (Stevens, J., concurring in part, dissenting in part) (citations omitted).

150. Instead of a reasonable observer who possesses knowledge of the history and circumstances of a display, he would “ask whether some viewers of the religious display would be likely to perceive a government endorsement.” *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 800 n.5 (1995) (Stevens, J., dissenting).

Lynch concurrence, provides that “[i]f a reasonable observer would perceive a religious display in a government forum as government speech endorsing religion, then the display has made ‘religion relevant, in . . . public perception, to status in the political community.’”¹⁵¹ She has clarified it over the years, so that now we know that the reasonable observer is fully aware of the history and context of a symbol and is “a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.”¹⁵² In her view, the *Lynch* crèche and *Allegheny* menorah were properly viewed by the reasonable observer as celebrations of public holidays and pluralism; but the *Allegheny* crèche and both Ten Commandments displays signaled unconstitutional endorsements. Though the endorsement inquiry expresses an admirable expectation of equality among citizens, it has proved unworkable in application.¹⁵³

None of these three positions properly accounts for religious associations in civil society. The pluralities show no concern for impacts on religious associations when the state appropriates their messages; if any liberty interest is expressed it is Justice Scalia’s concern for “the people” to have shared religio-civic symbols. In contrast, Justice Stevens recognizes a harm that results from seeing religious symbols (whether one’s own or another’s), but it is framed only in psychological and individualist terms of “offense.”¹⁵⁴ The notion of “being offended,” however, simply does not capture the concern with diluting religious messages and threatening the mediating functions of religious associations.

Even Justice O’Connor’s endorsement test fails to account adequately for religious associational life. While she tries to employ the test as a mechanism for “protect[ing] the religious liberty [and] respect[ing] the religious diversity of the members of our pluralistic political community,”¹⁵⁵ her version of endorsement is concerned only

151. *Capitol Square Review & Advisory Bd.*, 515 U.S. at 787 (O’Connor, J., concurring) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O’Connor, J., concurring)).

152. *Id.* at 779-80 (quoting W. KEETON ET AL., PROSSER AND KEETON ON LAW OF TORTS 175 (5th ed. 1984)).

153. “[T]he Supreme Court’s own decisions on the issue have created so much uncertainty that the only sure answer is the one that eventually results from costly litigation.” *Freedom from Religion Found., Inc. v. Manitowoc Cnty.*, 708 F. Supp. 2d 773, 781 (E.D. Wis. 2010).

154. See Frederick Mark Gedicks, *Atmospheric Harms in Constitutional Law*, 69 MD. L. REV. 149 (2009).

155. *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 628 (1989) (O’Connor, J., concurring).

[T]he endorsement standard recognizes that the religious liberty so precious to the citizens who make up our diverse country is protected, not impeded, when government avoids endorsing religion Clearly, the government can *acknowledge* the role of religion in our society in numerous ways that do not amount to an endorsement.

Id. at 631.

with persons made to feel like “outsiders” or “second class citizens.” Of course this is important. But to focus only on those excluded discounts any harm to those who share the symbols on display. Indeed, the test assumes that these persons are made to feel like “insiders,” delighted that they have captured government to use as a vehicle for spreading their message.¹⁵⁶ While Justice O’Connor begins to identify a distortion of social relationships between and among groups in civil society,¹⁵⁷ the analysis pays no regard to the effects of government use of religious symbols on the mediating functions of both outsider and insider groups.

Justice Breyer, who, like Justice O’Connor, explicitly connects the Establishment Clause to religious freedom, also ignored any possible negative impacts on the Eagles or other mediating groups in his controlling concurrence in *Van Orden*. For him, religious freedom would be endangered if the state favored religion or involved itself in religious exercises; the Ten Commandments monument, viewed as a civic object, posed no such danger because it expressed ethical teachings widely shared among the citizenry.¹⁵⁸

B. Requiring Government Transformation of Religious Messages

When the Court determines that the state’s display of a religious symbol has violated the Establishment Clause, it assumes the

156. See *id.* at 601 n.51 (“Christians remain free to display crèches in their homes and churches. To be sure, prohibiting the display of a crèche in the courthouse deprives Christians of the satisfaction of seeing the government adopt their religious message as their own, but this kind of government affiliation with particular religious messages is precisely what the Establishment Clause precludes.”).

157. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 883 (2005) (O’Connor, J., concurring) (“Voluntary religious belief and expression may be as threatened when government takes the mantle of religion upon itself as when government directly interferes with private religious practices. When the government associates one set of religious beliefs with the state and identifies nonadherents as outsiders, it encroaches upon the individual’s decision about whether and how to worship. In the marketplace of ideas, the government has vast resources and special status. Government religious expression therefore risks crowding out private observance and distorting the natural interplay between competing beliefs. Allowing government to be a potential mouthpiece for competing religious ideas risks the sort of division that might easily spill over into suppression of rival beliefs. Tying secular and religious authority together poses risks to both.”).

158. Justice Breyer’s controlling concurrence in *Van Orden* recognizes the connection between the Establishment Clause restrictions on symbols and religious freedom, but is not concerned about groups like the Eagles, the donor of the Ten Commandments monument, and religious groups that share the symbol.

[T]he First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact.

Van Orden v. Perry, 545 U.S. 677, 704 (2005) (Breyer, J., concurring) (quoting *Sch. Dist. v. Schempp*, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring) (internal quotation marks omitted)).

original religious message has remained intact, and that the religious association has used the state as a mere conduit or mouthpiece for the group's message. In *Allegheny*, for instance, the plaque in front of the crèche at the top of the Grand Staircase read: "This Display Donated by the Holy Name Society."¹⁵⁹ Justice Blackmun noted that

The fact that the crèche bears a sign disclosing its ownership by a Roman Catholic organization does not alter this conclusion [that it violates the endorsement test]. On the contrary, the sign simply demonstrates that the government is endorsing the religious message of that organization *rather than communicating a message of its own*. But the Establishment Clause does not limit only the religious content of the government's own communications. It also prohibits the government's support and promotion of religious communications by religious organizations. *Indeed, the very concept of "endorsement" conveys the sense of promoting someone else's message. . . . [Government is prohibited from] lending its support to the communication of a religious organization's religious message.*¹⁶⁰

Justice Souter's dissent in *Van Orden* also follows this approach. He thought the Ten Commandments monument at the Texas statehouse violated the endorsement test because the Eagles, though a civic organization, was religious in its identity, purpose, and expression. He concluded that "[t]he State . . . expressly approved of the Eagles' proselytizing, which it made on its own."¹⁶¹ "There is no question," Justice Souter wrote, "that the State in its own right is broadcasting the [Eagles'] religious message."¹⁶²

In contrast, when the Court determines that a display comports with the Establishment Clause, the key to constitutionality is whether the group's religious message has been sufficiently desacralized by placement, context, explanatory plaques, and the like. Both the *Lynch* crèche and *Allegheny* menorah existed within a tableau of objects, religious and secular, arranged by government. And within that tableau, the *Lynch* crèche became a symbol of a season of goodwill, and the *Allegheny* menorah became a symbol of

159. *Cnty. of Allegheny*, 492 U.S. at 580.

160. *Id.* at 600-01 (emphasis added) (citations omitted). The Court concluded there was government "support and approval." *Id.* at 599-600.

161. *Van Orden*, 545 U.S. at 739 n.3 (Souter, J., dissenting). The speech of the Eagles, uttered forty years earlier, remained completely relevant today, as though one message had been issued and no changes had occurred in that time. For Justice Souter, the Eagles' religious identity (members had to believe in a Supreme Being), purpose (using religious teachings to solve the social problem of juvenile delinquency), and message (follow these religious moral teachings) should have led to the monument's unconstitutionality. "There is no question," Justice Souter wrote, "that the State in its own right is broadcasting the religious message [by accepting the monument, and acknowledging the Eagles' efforts to promote youth morality through placing Ten Commandments monuments around the country]." *Id.*

162. *Id.*

pluralism. In this way, governmental appropriation of theologically significant symbols of Christianity and Judaism resulted in their redefinition as secular emblems. And though not analyzed under the endorsement test, the Ten Commandments at the Texas statehouse, placed among many secular historic and civic objects in a nonsacral setting, was found to convey not faith but a “broader moral and historical message reflective of a cultural heritage.”¹⁶³ In all of these situations, the state’s acceptance and appropriation of the symbol changed the donor groups’ intended meaning.¹⁶⁴ The crèche, menorah, and Ten Commandments are redefined by placement, context, and interpretive signs. As long as the theologically significant symbol is transformed into secularized government expression for governmental purposes, it is constitutional.

From the perspective of the religious association, both of these alternatives are harmful. Where the state promotes a group’s message, the necessary church-state tensions are reduced and the mediating function compromised. Where the state appropriates the message and gives it a new meaning—the constitutional scenario—a new harm is added to the familiar ones: now the state oversteps its bounds as a political sovereign to attempt to reconcile particularistic theological values with secular values. It is like the case of *Engel v. Vitale*, where the New York City Board of Regents wrote a prayer for students to recite each day.¹⁶⁵ That prayer was broadly nondenominational and nonoffensive to many. In essence, it attempted to reconcile various religious proclamations with a unifying civic expression. But government simply cannot write a prayer, even in a way that diminishes the religious content. Similarly, it cannot adopt a theological symbol, even in a way that minimizes religious meaning. Ecumenical efforts, and the reconciling of public and particularistic norms, come not from government efforts but from religious associations working together. Such efforts are not part of the state’s public ordering role, nor of the state’s coordinating role. In this latter role, the government coordinates the activities of nonstate actors. Even when government itself is involved in a social task along with nonstate actors, it refrains from assuming or absorbing the independent functions of those actors. But as to theologically significant expression, government has no proper role of

163. *Id.* at 703 (Breyer, J., concurring). Justice Breyer acknowledged that it would be a religious symbol if found in a sacred setting.

164. The record in *Van Orden*, however, is unclear. If one takes Justice Souter’s view, then the Eagles’ intended message was blatantly religious. If one takes Justice Breyer’s view, the Eagles’ message was primarily civic. They are both correct to some degree, since civic republicans view religion (or certain religious values) to be beneficial to society. Each justice is emphasizing an aspect of the group’s civic republican faith. See ADAMS & EMMERICH, *supra* note 66.

165. 370 U.S. 421, 422 (1962).

its own.¹⁶⁶ Its primary role is to make room for the voices of religious people and groups.

Religious groups should know this, and many of them do. Indeed, Chabad of *Allegheny* vigorously opposed a view that its menorah was somehow part of government expression, claiming the symbol was *its* expression; it had even held religious candle lighting ceremonies at that site.¹⁶⁷ Chabad understood the steps of the City-County Building in Pittsburgh to be a public forum, and claimed a right to place its menorah there as a matter of equal access under the Free Speech Clause.¹⁶⁸ Had the Court found the location to serve the expressive purposes of an open forum, the message conveyed would have been Chabad's; there would be no need for the state to transform the message from one commemorating a miracle into one celebrating American pluralism.¹⁶⁹ The association's voice would have been retained, as was possible in other contemporaneously litigated cases where menorahs were placed in public forums.¹⁷⁰

166. Theologically significant expression does not include the use of religious textual or symbolic elements in civic or patriotic symbolic expression. *See supra* note 15.

167. *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 621 n.70 (1989); *see also id.* at 642 (Brennan, J., concurring).

168. Arguing in its brief (as an intervenor) to the Supreme Court that the menorah was the association's speech, and not only permissible but required, Chabad wrote: "if Christianity may be represented by a Christmas tree on the steps of the . . . [b]uilding, Pittsburgh must grant equal access, on request, to the symbols of other faiths." Brief for Petitioner Chabad, *Cnty. of Allegheny v. ACLU*, 492 U.S. 573 (1989) (No. 88-90), 1988 WL 1025855, at *6. In the decision, the Court mentioned that Chabad had argued "that it has a constitutional right to display the menorah in front of the City-County building. In light of the Court's disposition of the Establishment Clause question as to the menorah, there is no need to address Chabad's contention." *Cnty. of Allegheny*, 492 U.S. at 588 n.38.

169. The Grand Staircase does not appear to be the kind of location in which all were

free to place their displays for weeks at a time, so that the presence of the crèche in that location for six weeks would then not serve to associate the government with the crèche. . . . [I]t remains true that any display located there fairly may be understood to express views that receive the support and endorsement of the government. . . . In this respect, the crèche here does not raise [a] "public forum" issue

Id. at 600 n.50; *cf. McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984). The Court noted the lack of a public forum in the crèche context even though it refused to reach Chabad's public forum argument in connection with the menorah display. Five years before, Justice Brennan had specifically mentioned, in his *Lynch* dissent, that in contrast to a case involving equal access for religious speech to a public forum, "[h]ere . . . Pawtucket itself owns the crèche and instead of extending similar attention to a 'broad spectrum' of religious and secular groups, it has singled out Christianity for special treatment." *Lynch v. Donnelly*, 465 U.S. 668, 702 (1984) (Brennan, J., dissenting).

170. Similarly, Summum sought to place a monument of its "Seven Aphorisms" in a public park in which a Ten Commandments monument sat, on the assumption that the park was a public forum. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1129-30 (2009). The Court held that it was not a public forum for purposes of permanent structures. *Id.* at 1138.

*C. Failing to Coordinate Public and Private Property Toward
Religious Freedom*

All of this jurisprudential development on symbols has taken place without any doctrinal coordination with approaches to religious exercise on private property and in public forums. A legal system like ours, wedded to some level of restriction concerning religion on public property, should recognize the need to protect religious exercise on private property. Indeed, it is well settled that religious exercise should be most vigorous on private property, where it “is promised freedom to pursue that mission.”¹⁷¹ But judicial interpretation tends to ignore the relationship between freedom on private property for religious uses and symbolism and the concomitant restrictions on public property. In the last few decades an explosion of land use regulation, both governmental and private, has created difficulties for religious individuals and groups to use or adorn private property in ways that give expression to their religious identity. Under the Free Exercise Clause, nondiscriminatory restrictions on uses and symbols are assumed to be fair when, in reality, they can severely impede religious exercise.¹⁷² Despite federal statutory attention to correct such impediments, we continue to see examples of deference to comprehensive regulation and support for religion-free spaces.¹⁷³ Additionally, some restrictions on religious access to public forums recently have been found constitutional.¹⁷⁴ So it is particularly ironic that some significant restrictions on religious use of private property and public forums continue, while theologically significant symbols are welcomed on public property.

This chaotic patchwork of decisions is not surprising. Courts do not coordinate public and private property jurisprudence to ensure fidelity to the overarching vision of a clearly defined state with no sacral function and a vast civil society that enjoys vibrant religious associational life. Among the Supreme Court justices highly deferential to general and neutral land use restrictions on private property, we find some with a broad understanding of participation

171. *Lee v. Weisman*, 505 U.S. 577, 589 (1992).

172. *See Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 892-93 (1990) (O’Connor, J., concurring).

173. *See, e.g., River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 373-74 (7th Cir. 2010); *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 264-68 (3d Cir. 2007); *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 615 F. Supp. 2d 980, 996, 1000-01 (D. Ariz. 2009); *see also Carmella, RLUIPA, supra* note 24, at 522-24.

174. *See, e.g., Bronx Household of Faith v. Bd. of Educ.*, 2011 WL2150974 (2d Cir. June 2, 2011) (vacating injunction against Board of Education policy prohibiting use of public schools for worship purposes); *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891 (9th Cir. 2007) (prohibiting use of public library for worship purposes); *see also Christian Legal Soc’y Chapter of the Univ. of Ca., Hastings Coll. for the Law v. Martinez*, 130 S. Ct. 2971 (2010) (university student groups required to comply with all-comers policy).

by religious groups in public forums. Taking this together with deference to nondenominational and noncoercive uses and symbols on public property, these justices seem to partially invert the paradigm, permitting religion on public property (both forum and nonforum property) while deferring to its restriction on private property.

Justice Stevens' model of a presumption against religious symbols on public property fares no better; indeed, it subverts the overarching design. Initially the approach appears to be the one most committed to sustaining the vibrancy of religious exercise on private property;¹⁷⁵ in his *Van Orden* dissent, he argues that

[t]he Eagles may donate as many monuments as they choose *to be displayed in front of Protestant churches, benevolent organizations' meeting places, or on the front lawns of private citizens*. . . . [T]he message they seek to convey is surely more compatible with church property than with property that is located on the government side of the metaphorical wall.¹⁷⁶

But when we examine Justice Stevens' record on free exercise interpretation, we see that he is always willing to defer to nondiscriminatory restrictions on religion.¹⁷⁷ His decision in *Kelo v. City of New London* offers another look at a highly deferential position vis-à-vis local land use decisions that affect private property.¹⁷⁸ In the public forum context, he would mandate the exclusion of religious objects, as he does not think free standing religious symbols (as opposed to transient speech) should be allowed *at all*.¹⁷⁹ Moreover, he has extended this presumption against religious symbols to *private* property that was formerly owned by the government but transferred to cure a constitutional violation.¹⁸⁰ Justice Stevens' deferential approach to land use restriction, taken together with the presumption against any religious symbol on *any* public property, yields an approach that defers to or requires restrictions on religious land use everywhere—forum, nonforum, and private property.

Justice O'Connor comes closest to articulating interpretations of the Religion Clauses with a sense of the overarching vision of the state's role in protecting vibrant religious life in civil society, but the endorsement test continues to muddle what might otherwise provide

175. See *supra* note 149 and accompanying text.

176. *Van Orden v. Perry*, 545 U.S. 677, 735 (2005) (Stevens, J., dissenting) (emphasis added).

177. He goes well beyond his colleagues who share this view of the Free Exercise Clause. See *City of Boerne v. Flores*, 521 U.S. 507, 536-37 (1997) (Stevens, J., concurring) (RFRA's special regard for religious practice violates the Establishment Clause).

178. 545 U.S. 469 (2005).

179. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 797, 801-02 (1995) (Stevens, J., dissenting).

180. See *infra* notes 237-239 and accompanying text.

the building blocks to relational understanding of religion on private and public property. Her sense of both free exercise rights and private property rights is strong. She fought (unsuccessfully) against lowering the standard of review of general, neutral laws in the interpretation of the Free Exercise Clause, noting that burdens on religious exercise could result from nondiscriminatory laws just as easily as from discriminatory ones.¹⁸¹ Further, Justice O'Connor's understanding of autonomy and expressive freedoms on private property is strong: her dissent in *Kelo v. City of New London* flatly rejected judicial deference to local land use controls when they severely affected the enjoyment of private property.¹⁸² She has a strong sense of government discretion in the management of its property,¹⁸³ though all public property—forum and nonforum—is subject to the endorsement test, which she views as freedom-enhancing. Even if her decisions can be pieced together to show consistency with the overarching design, Justice O'Connor does not explicitly coordinate public and private property understandings; and the endorsement test's call for diminishing religiousness of a religious symbol remains problematic.

A comprehensive commitment to associational freedom necessarily requires coordination among the various bodies of law in order to address the issues of religion on private property, in public forums and on public property. Courts and legislatures must consider, in each of these areas, the effects of restriction on the identity, purpose, and expression of religious associations, particularly as those shared bonds are necessary to their mediating role in civil society. A holistic perspective that integrates these various fields of jurisprudence to protect religious associations would promote the overarching design that limits government and locates vibrant religious life in civil society. Such a balanced perspective would ensure a commitment to greater freedom for responsible religious land use on private property and greater religious access to (and broader definition of) public forums while at the same time enforcing some limits on governmental appropriation of theologically significant symbols loaned or donated by nonstate actors. Simply to restrict religious symbols on public property, without also ensuring greater freedom

181. See *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 892 (1990) (O'Connor, J., concurring); *Flores*, 521 U.S. at 544-45 (O'Connor, J., dissenting).

182. 545 U.S. at 494 (O'Connor, J., dissenting).

183. Though a regrettable lack of concern for the religious land use of Native Americans on its sacred lands (which is also federally owned property), the decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n* draws a sharp distinction between religion on private and public property. 485 U.S. 439, 452-53 (1988) (special protections for Native American religious exercise on federal lands could result in an unconstitutional "religious servitude"; only access to sacred sites could be expected); see also *supra* note 43 and accompanying text.

for religious groups and individuals to engage in symbolic expression on private property and in independent public spaces, would create a religion-restrictive regime across the board. Moreover, to restrict all religious symbols without distinguishing between symbols of active religious communities and symbols long invested with civic significance would promote a kind of iconoclasm disconnected from religious freedom.

IV. PROTECTING RELIGIOUS ASSOCIATIONS AND THEIR MESSAGES

Under current Establishment Clause interpretation, there is no way to maintain an intact *religious* message in a closed forum. While the Court seems to suggest that the messages continue to belong to the religious association—as we see from the *Allegheny* crèche (and Justice Souter’s dissent in *Van Orden*)¹⁸⁴—those messages are unconstitutionally endorsed and so cannot be present on public property. The only way the symbolic expression becomes permissibly present is if government takes it on and secularizes it,¹⁸⁵ or if the donor group has already secularized it.¹⁸⁶

184. See *supra* notes 160-162 and accompanying text.

185. See *supra* notes 163-164 and accompanying text.

186. Justice Breyer’s analysis in *Van Orden* seemed to suggest that the Eagles’ message retained its integrity even in closed government space. Of course he speaks of the way the monument’s placement among numerous civic and historic objects minimizes its religious origins, making it instead a message of the shaping of civic morality.

The physical setting of the monument, moreover, suggests little or nothing of the sacred. . . . The setting does not readily lend itself to meditation or any other religious activity. But it does provide a context of history and moral ideas. It (together with the display’s inscription about its origin) communicates to visitors that the State sought to reflect moral principles, illustrating a relation between ethics and law that the State’s citizens, historically speaking, have endorsed.

Van Orden v. Perry, 545 U.S. 677, 702 (2005) (Breyer, J., concurring). But Justice Breyer makes much more of the secular and civic identity of the Eagles; then he notes that the monument “prominently acknowledge[s] that the Eagles donated the display, a factor which, though not sufficient, thereby *further distances the State itself from the religious aspect of the Commandments’ message.*” *Id.* at 701-02 (emphasis added). Finally, he highlights the fact that the wording of the Ten Commandments was a commissioned ecumenical effort, not taken from a preexisting religious text. *Id.* at 701. A secular group, clearly identified as the donor, and a text that is a step removed from religious sources, taken altogether, make the Eagles’ message a predominantly secular one about civic morality in the fight against juvenile delinquency. It seems that Breyer depends heavily on the notion that the mediating association *has already transformed* the message from a religious one into a civic one; therefore it is legitimate for the state to appropriate it. In his analysis, it very much seems to be the voice of the Eagles that speaks, even though the property is not considered a public forum. This seems contrary to the holding of *Summum*, which terminates the voice of the donor upon acceptance by the government. See *supra* notes 97-102 and accompanying text. For an analysis of these decisions as mixed governmental and private speech, see Claudia E. Haupt, *Mixed Public-Private Speech and the Establishment Clause*, 85 TUL. L. REV. 571 (2011) (proposing “an ‘effective control’

In contrast, theological symbols retain their connection to the speaker on private property and in public forums and other independent public spaces, where state involvement in expressive content is minimal or nonexistent. Protecting such expression is critical to ensuring the vitality of religious associations in civil society. Indeed, this recognition underlies the development of two approaches to “curing” unconstitutional displays that do not require removal of the symbol or its secularization: the expansion of the public forum and the transfer of public property into private hands. The state (through its courts, legislature, or executive) might decide that an improper church-state relationship may be or should be remedied either by acknowledging or designating the space around the symbol to be a public forum or by transferring the symbol and the land on which it sits to a private party. In each case, the goal is to ensure that the message belongs to the association, and not to the government. The transfer—the more recent and controversial option—turns the parcel into private property, terminating state sponsorship of the symbol as well as any state action; along with privatization goes the freedom of expression that attaches to private property. Such cures are not specific to these situations; changing the scope of public forums and transferring public property to private parties are part of the routine activities of government and are either inherent in the discretion of government in the management of its property or specifically governed by statute and regulations. The discussion below first attends to the notion of expanded independent spaces, and then to the government transfer of the public property on which a symbol sits. The Supreme Court’s recent decision in *Salazar v. Buono* addresses this option.¹⁸⁷ The case involved the congressional transfer of federal property to the Veterans of Foreign Wars, as well as the cross that sat on that property for seventy years.¹⁸⁸ While the Court is not able to produce a majority holding, its 5-4 judgment makes clear that such a transfer can be constitutional.¹⁸⁹

A. *By Locating Symbols in the Public Forum*

The public forum fits the model of a state committed to a vibrant civil society. One of the roles of the limited, activist state is the coordination and assistance of organizations in their promotion of the common good. Government fulfills this task in part by providing public spaces for public discourse and protest. Without controlling the content of the conversation, the state manages space for public

framework to determine Establishment Clause responsibility in cases where public and private actors jointly engage in speech”).

187. 130 S. Ct. 1803 (2010).

188. *Id.* at 1811-12.

189. *See id.* at 1821.

conversation and the common good of civil society.¹⁹⁰ Indeed, criticism of public forum doctrine has focused on the ways the doctrine fails the common good, specifically on the way in which it gives government near total discretion to open, close, and redefine forums.¹⁹¹

Once a forum is established, however, government can decide to accommodate not only transient speech by persons assembled for discourse or protest, but temporary “unattended displays” and, where space is sufficient, permanent monuments as well.¹⁹² Furthermore, *Capitol Square* made clear in upholding the Klan’s cross on the plaza in front of the Ohio statehouse that religious displays could remain in the forum even if the forum was near a seat of government.¹⁹³ Though government has tremendous discretion in this area, the public forum must be managed in a way that does not produce favoritism or sponsorship or prefer one religious message to the exclusion of other messages.¹⁹⁴

Religious groups give voice to their identity and purpose by their presence in a public forum, but the experience of symbolic expression within a public forum is decidedly different from speaking on one’s private property.¹⁹⁵ No speaker can control the messages of other speakers. If there are multiple symbols, they may include some which directly challenge a group’s interpretation of its own symbol. So a church group might display a crèche but find next to it a sign from an atheist group proclaiming “Solstice is the Reason for the

190. Streets, sidewalks and public parks have “immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

191. In particular, there is concern that the doctrine has led to an ever-decreasing list of spaces open to face-to-face discourse, including proselytizing, protest, and symbolic expression. See Zick, *Speech and Spatial Tactics*, *supra* note 104; Zick, *Property, Place, and Public Discourse*, *supra* note 104; Zick, *Space, Place, and Speech*, *supra* note 104, at 446 (arguing that government has moved from “‘trustee’ of some significant public properties” with public easement for expression to proprietor of public space).

192. Cases involve communications affixed to structures like utility poles and billboards. For an unfortunate example of a town that decided to close its forum to unattended structures specifically to avoid a variety of symbolic messages that might compromise aesthetics, see *Knights of Columbus, Council #94 v. Town of Lexington*, 272 F.3d 25 (1st Cir. 2001).

193. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 797 (1995).

194. See *supra* notes 80-87 and accompanying text. Public forums can be locations for robust private symbolic expression, even when Establishment Clause norms set the outer boundaries of participation; however, the public forum approach would not necessarily yield robust expression in contexts where Establishment Clause norms might restrict religious speech in particularly harsh ways. See Carmella, *Religion-Free Environments*, *supra* note 24, at 97 n.186 (analyzing application of constitutional norms to private residential communities).

195. Participation in a public forum may be the only way a group speaks publicly and symbolically if it has no access to private property.

Season.”¹⁹⁶ Or a group might use a symbol in ways that are offensive to others, as when the Klan placed its cross on the plaza. But that presented an opportunity for response, as numerous churches came together to place crosses on the plaza. Depending upon the policies and history of the forum, a religious group might think twice about placing its symbol within a public forum. This has not been a widespread problem, however, especially since forums are often understood to accommodate a variety of speakers over a long period of time. Depending upon the location and history of the space, the particular policy will create a particular character and reputation; time, place, and manner restrictions also help soften jarring juxtapositions in the “marketplace of ideas.” But the risk remains whenever one speaks in a free society: others may be present to counter or confuse the message. This results in each association clarifying its own expression.

After the 1984 *Lynch* decision regarding the Pawtucket crèche, it became immediately clear that the distinction between public property and public forums would be critical. As Justice O'Connor has noted, “there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”¹⁹⁷ In fact, around the time that *Lynch* was decided, the Second Circuit held constitutional the temporary presence of a crèche in a park, which the court found to be a traditional public forum “available to a broad range of . . . nonreligious and religious organizations, groups and persons.”¹⁹⁸ The Supreme Court affirmed that decision by an equally divided vote.¹⁹⁹ In the decade between then and the Court’s 1995 holding in *Capitol Square*, federal district and circuit courts decided numerous cases involving religious symbols in public forums. Many existing

196. This may result in an unusual collection of symbols. See, e.g., *Osediacz v. City of Cranston*, 414 F.3d 136, 138 (1st Cir. 2005) (declaring the south lawn of city hall as a “limited public forum” invited “a large menorah accompanied by a sign conveying wishes for ‘a Happy Chanukah’; a near-life size nativity scene; an inflatable seven-foot-tall snowman and a similarly sized Santa Claus; a huge holographic angel; a train of fifteen pink flamingos with Santa Claus hats; and a sign that read ‘Happy Holidays from the Teamsters Union.’ Faced with this embarrassment of riches,” the city “barred further entries.”); cf. *Freedom from Religion Found., Inc. v. Manitowoc Cnty.*, 708 F. Supp. 2d 773, 781 (E.D. Wis. 2010) (crèche was constitutional under new policy designating portion of the front lawn of county courthouse public forum, but court noted the county may come to regret its solution to the problem if “deluged with applications” for displays like those in Cranston).

197. *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990).

198. *McCreary v. Stone*, 739 F.2d 716, 727 (2d Cir. 1984), *aff’d by equally divided court, sub nom.* *Bd. of Trs. v. McCreary*, 471 U.S. 83 (1985). The existence of a disclaimer that identified the message as private speech of a private organization was important.

199. *Bd. of Trs. v. McCreary*, 471 U.S. 83 (1985), *aff’g by an equally divided court, McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984).

structures, as well as new seasonal symbols like menorahs, were found constitutional because the locations were found to be public forums.²⁰⁰ Such protections continue to today.²⁰¹ These decisions remind us that the symbolic expression of the public forum is the domain of nonstate groups in civil society—groups with names like the Catholic Women’s Club, the Christmas Committee, the Caro Women’s Interfaith Committee for Christmas, Chabad Lubavitch, and various religious congregations and citizens groups, as well as individuals.

A more relaxed definition of public forum is in order, especially one that responds to spontaneous actions by citizens²⁰² and to situations in which no government “selective receptivity” has occurred. This would recognize “de facto” public forums for these types of private expression on public property that is neither a traditional nor designated public forum. Since governmental promotion or transformation of religious messages is most harmful to groups, opportunities to remove these types of state involvement make sense for the protection of associational life. But there are formidable obstacles to such developments in the public forum doctrine, as government jealously guards its power to control and manage its property.²⁰³ Yet it seems that to acknowledge nonstate

200. See, e.g., *Kreisner v. City of San Diego*, 1 F.3d 775, 782 (9th Cir. 1993) (Overtly religious display of biblical scenes if “sponsored by the government . . . would violate the Establishment Clause. Notwithstanding its strong religious content, however, we conclude that because the display is private speech in a traditional public forum removed from the seat of government it does not have the primary effect of advancing religion.”); *Ams. United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1539 (6th Cir. 1992) (private organization may erect menorah in traditional public forum).

201. See, e.g., *Freedom from Religion Found., Inc.*, 708 F. Supp. 2d at 775, 776 (New policy designating portion of front lawn of county courthouse public forum, its “purpose is to allow citizens to have their own displays shown on courthouse grounds without respect to the message (religious or otherwise) contained within the display”; crèche (erected by the Catholic Women’s Club) found constitutional, as no endorsement of “the group’s religious message.”); *Satawa v. Bd. of Cnty. Rd Comm’rs*, 687 F. Supp. 2d 682 (E.D. Mich. 2009) (crèche had to be removed from median for traffic safety, because even if a public forum, traffic safety was a compelling governmental interest, even though crèche was displayed every Christmas season since 1945); *Jocham v. Tuscola Cnty.*, 239 F. Supp. 2d 714 (E.D. Mich. 2003) (county courthouse lawn found to be a public forum, crèche is properly located there as private speech of the Caro Women’s Interfaith Committee for Christmas).

202. *Salazar v. Buono*, 130 S. Ct. 1803, 1818 (2010) (“The goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm. A cross by the side of a public highway marking, for instance, the place where a state trooper perished need not be taken as a statement of governmental support for sectarian beliefs. The Constitution does not oblige government to avoid any public acknowledgment of religion’s role in society.”).

203. As we see from *Summum*, even traditional open forums with respect to transient speech may be closed when it comes to structures (like a monument); further, current public forum doctrine holds that designated forums can only be created by “purposeful government action” in which “the government must intend to make the property ‘generally available.’” Ark. Ed. Television Comm’n v. Forbes, 523 U.S. 666, 677-78 (1998). “The government does not create a [designated] public forum by inaction or by permitting

expression outside of the specific confines of public forum doctrine would threaten neither the proper roles of the state nor the state's own symbolic expression.²⁰⁴ Further, it seems necessary for understanding certain cases, like the example of spontaneous private expression on public property found in *Salazar v. Buono*,²⁰⁵ described immediately below.

B. By Transferring Symbols (and the Land on Which They Sit) to Private Ownership

The transfer to private parties of theological symbols and the publicly-owned parcels beneath them (rather than physically moving the symbols to private property) has been used in some cases over the last fifteen years. At the heart of the remedial transfer option lie two concerns: that removing symbols could lead to the kinds of social conflict the Establishment Clause was intended to prevent;²⁰⁶ and that removal itself has a semiotic function, conveying its own negative message of rejection, depending upon the history and circumstances of the symbol.²⁰⁷ These concerns extend more generally to the potential destruction of landmark monuments and architectural elements that a broad reading of the endorsement test could yield, given that many civic symbols adorning public property contain biblical images and verses.²⁰⁸

Municipalities have begun to use the privatization option to avoid costly Establishment Clause litigation. Their goal has been to terminate state action so that the symbol is unequivocally private, rather than governmental, expression. Nonetheless, suits have been filed challenging the transfers themselves. The Seventh Circuit has twice upheld transfers, finding that in the absence of evidence of a sham transaction, "a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion."²⁰⁹ And in 2003 Congress used this remedial transfer option, which the

limited discourse, but only by intentionally opening a nontraditional public forum for public discourse." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

204. And it seems that the Court has already done so, at least unwittingly. *See supra* notes 158, 185.

205. 130 S. Ct. 1803 (2010).

206. *Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring).

207. *Buono*, 130 S. Ct. at 1822-23 (Alito, J., concurring).

208. Brief of the International Municipal Lawyers Ass'n as Amicus Curiae in Support of Petitioner, *supra* note 15, at 3 (describing the transfer option in *Salazar v. Buono* as "a critical curative mechanism for governmental entities seeking a legitimate option short of razing historically significant memorials or displays").

209. *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000) (valid transfer of 0.15 acres of city park with statue of Christ terminated the endorsement because the exchange involved payment of fair market value and government had no duties of ownership); *see also* *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 702-04 (7th Cir. 2005) (applying *Marshfield* to find no endorsement where city transferred monument and land to original donor).

Supreme Court recently addressed in *Salazar v. Buono*.²¹⁰ The district court opinion, affirmed on appeal, held that the transfer was a sham.²¹¹ The Supreme Court reversed the Ninth Circuit's decision of unconstitutionality and remanded the case to the district court.²¹² While the Court could not agree on a holding, the judgment garnered the support of five justices, which implies that such transfers can indeed comport with the Establishment Clause.

Buono involved a cross visible from a highway, on a mountaintop known as Sunrise Rock in the Mojave National Preserve in California. Sunrise Rock is federally owned, although there are some pockets of privately owned parcels scattered throughout the preserve's 1.6 million acres.²¹³ In 1934, the Veterans of Foreign Wars (VFW) erected the cross along with a plaque noting that it was a memorial to those who died in World War I.²¹⁴ At the time it was common to use a cross to memorialize war dead, and its stark whiteness evoked the common image of rows and rows of plain white crosses in military cemeteries. In contrast to the more typical situation in which a group offers to donate a monument which is then accepted and placed on public property, the VFW never sought or received permission to place the cross at this location, and the National Park Service, the federal agency charged with overseeing the preserve, never even acknowledged the symbol's presence.²¹⁵ Maintained over the years by one veteran, and more recently by another individual, the cross was actually changed several times. For nearly seventy years, the VFW assumed that the symbol was its own expression,²¹⁶ much as Chabad thought its menorah on the steps of the *Allegheny* City-County Building was its expression.²¹⁷ Of course the VFW had changed the theological meaning of the symbol to a patriotic one. As the Eagles had transformed the Ten Commandments into a civic symbol of the group's efforts to combat juvenile delinquency,²¹⁸ and the Klan had changed the cross into a political and racist symbol,²¹⁹ it is clear that nonstate associations in

210. 130 S. Ct. 1803 (2010).

211. *Buono v. Norton*, 364 F. Supp. 2d 1175, 1182 (C.D. Cal. 2005).

212. *Buono*, 130 S. Ct. at 1820-21.

213. *Id.* at 1811. Boundaries between private and federal land in the preserve "are often not marked," *id.* at 1822 (Alito, J., concurring), and 10% of the land in the preserve is owned either by the state or by private parties. *Id.* at 1811 (Kennedy, J., plurality opinion).

214. *Id.* at 1811.

215. *Id.* at 1821-22 (Alito, J., concurring). Nor did it take action to enforce 36 C.F.R. § 2.62(a) (2009) (federal regulation prohibiting religious symbols in national parks).

216. See Brief of Amici Curiae Veterans of Foreign Wars of the United States, et al., Supporting Petitioners at 5-6, *Buono*, 130 S. Ct. 1803 (No. 08-472).

217. See *supra* note 167 and accompanying text.

218. See *Van Orden v. Perry*, 545 U.S. 677, 701 (2005) (Breyer, J., concurring).

219. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) (Thomas, J., concurring); see also *id.* at 772 (criticizing Court's treating cross as religious

civil society are free to appropriate symbols for their own purposes and use them for their own purposes.²²⁰ The important difference is that the state and its powers are not involved in such redefinition.

The private nature of the VFW's expression would have been unequivocally established in 1999 if the federal government had been authorized to convert Sunrise Rock into a public forum in response to a group's request to place a Buddhist stupa nearby. But this was not possible, and the group was told that the cross would be taken down. Since the federal government could not create a public forum by allowing the Buddhist stupa, the cross became a single message in government-controlled space.²²¹ Frank Buono, a retired park service employee, sued on establishment grounds, which led to the district court's decision that a reasonable observer would view a cross on federal land as governmental endorsement of Christianity. The court issued an injunction in 2002.²²²

Before the Ninth Circuit affirmed,²²³ Congress enacted a statute authorizing the transfer of the cross and the land beneath it to the VFW in exchange for land elsewhere in the preserve owned by the individual currently maintaining the cross.²²⁴ The statute provided that ownership would revert to the federal government if the property was not maintained "as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war."²²⁵ Buono returned to the District Court to prevent this transfer through enforcement or modification of the 2002 injunction. This time the court held that the transfer statute was a sham to preserve the cross at the site, and

speech and arguing it should have been treated as political speech instead: "The Klan simply has appropriated one of the most sacred religious symbols as a symbol of hate.").

220. See *supra* notes 3-5 and accompanying text. Even secular symbols can be appropriated by religious groups and given religious meaning. See *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940), *overruled by* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 629 (1943) (Jehovah's Witnesses treat American flag as a forbidden "graven image"); see also *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (protection of proselytizing includes negative statements concerning other faiths).

221. See Brief of the American Muslim Armed Forces and Veterans Affairs Council, and the Muslim American Veterans Ass'n at 28, as Amici Curiae in Support of Respondent, *Buono v. Salazar*, 130 S. Ct. 1803 (2010) (No. 08-472) ("Government did not itself place the cross; government allowed private citizens to place the cross and it refused to allow other private citizens to place symbols of other faiths. This preferential treatment is a form of government sponsorship of the cross. If the government had allowed all faiths to place their religious symbols at Sunrise Rock, there would have been a limited public forum instead of a government-sponsored cross." (citation omitted)). Of course the designation of a public forum was precluded by federal regulation, see *supra* note 215.

222. *Buono v. Norton (Buono I)*, 212 F. Supp. 2d 1202, 1217 (C.D. Cal. 2002).

223. *Buono v. Norton (Buono II)*, 371 F.3d 543, 550 (9th Cir. 2004).

224. Congress had acted earlier by designating the cross as a national World War I memorial, had authorized restoration of the original cross and explanatory plaque, and had forbidden the use of federal funds to remove it. *Buono*, 130 S. Ct. at 1813-14.

225. *Id.* at 1813 (quoting Dep't of Def. Appropriations Act, 2004, Pub. L. 108-87, §§ 8121(a), 8121(e), 117 Stat. 1100 (2003)).

enjoined its implementation,²²⁶ a decision later affirmed by the Ninth Circuit.²²⁷ The Supreme Court granted certiorari.²²⁸

One of the issues before the Supreme Court²²⁹ was whether the injunction against implementation of the land transfer statute was proper. (The decision that the cross on federal land violated the Establishment Clause had not been appealed and was therefore not before the Court.²³⁰) In a 5-4 vote on the judgment, the Court reversed the Ninth Circuit and remanded for further proceedings.²³¹ Only Justice Kennedy and Chief Justice Roberts, however, opined that the remand was necessary, on the theory that the District Court had never engaged in an independent Establishment Clause inquiry regarding the transfer.²³² Justice Kennedy wrote,

The 2002 injunction thus presented the Government with a dilemma. It could not maintain the cross without violating the injunction, *but it could not remove the cross without conveying disrespect for those the cross was seen as honoring*. . . . Deeming neither alternative to be satisfactory, Congress enacted the [transfer] statute

In belittling the Government's efforts as an attempt to "evade" the injunction, the District Court had things backwards. . . . *The land-transfer statute embodies Congress's legislative judgment that this dispute is best resolved through a framework and policy of accommodation for a symbol that, while challenged under the Establishment Clause, has complex meaning beyond the expression of religious views*. That judgment should not have been dismissed as an evasion, for the statute brought about a change of law and a congressional statement of policy applicable to the case. . . .

. . . .
. . . The court made no inquiry into the effect that knowledge of the transfer of the land to private ownership would have had on any

226. *Buono v. Norton (Buono III)*, 364 F. Supp. 2d 1175, 1182 (C.D. Cal. 2005).

227. *Buono v. Kempthorne*, 502 F.3d 1069, 1086 (9th Cir. 2007), *reh'g en banc denied*, 527 F.3d 758, 760 (2008) (O'Scannlain, J., dissenting).

228. *Salazar v. Buono*, 129 S. Ct. 1313 (2009).

229. *Buono's* standing was also an issue.

230. Because the holding on the constitutionality of the cross was not appealed, the Court did not opine on this issue. But five justices made it clear that they did not agree with the district court's holding; they were willing to view the cross's message as one of a war memorial. Justice Kennedy wrote that the cross was "intended simply to honor our Nation's fallen soldiers" and that for over seventy years "the cross and the cause it commemorated had become entwined in the public consciousness." *Buono*, 130 S. Ct. at 1817. In contrast, several of the remaining justices clearly considered the cross a Christian symbol, which does not belong on public property. *See id.* at 1828 (Stevens, J., dissenting, joined by Ginsburg and Sotomayor, JJ.).

231. *Id.* at 1821 (plurality opinion).

232. Justice Alito thought the reversal was sufficient, without remand, because enough facts were before the Court to decide that the transfer statute was constitutional. *Id.* at 1821 (Alito, J., concurring). Justice Scalia and Justice Thomas did not think the plaintiff had standing to bring the suit because he had no objection to a cross on private land. *Id.* at 1824 (Scalia, J., concurring).

perceived government endorsement of religion, the harm to which the 2002 injunction was addressed. The District Court thus used an injunction granted for one reason [i.e., the endorsing effect of the cross] as the basis for enjoining conduct that was alleged to be objectionable for a different reason [i.e., an illicit purpose of the transfer]. Ordering relief under such circumstances was improper²³³

Justice Alito's separate concurrence would not have sent the case back for this determination. Believing that there was sufficient evidence to reverse the appeals court, Justice Alito thought that "[t]he obvious meaning of the injunction was simply that the Government could not allow the cross to remain on *federal* land,"²³⁴ implying that upon transfer the expression ceases to be governmental and is once again the VFW's speech. He was particularly concerned with the removal of a longstanding symbol and the meaning it signaled: "as a sign of disrespect for the brave soldiers whom the cross was meant to honor"; and "as an arresting symbol of a Government that is not neutral but hostile on matters of religion and . . . bent on eliminating from all public places and symbols any trace of our country's religious heritage."²³⁵ Given these reasons to justify the transfer, Justice Alito considered Congress' goal in crafting the transfer "to commemorate our Nation's war dead and to avoid the disturbing symbolism that would have been created by the destruction of the monument."²³⁶

In contrast to these justices who considered deference to the transfer appropriate, Justice Stevens found that the district court engaged in the appropriate inquiry and properly enforced the injunction against the transfer statute, noting that government endorsement would continue *even after* the transfer of title to the VFW.²³⁷ Because he assumed that the cross could not be removed

233. *Id.* at 1817-19 (plurality opinion) (citation omitted) (emphasis added).

234. *Id.* at 1824 (Alito, J., concurring).

235. *Id.* at 1823.

236. *Id.* at 1824.

237. "Government has endorsed the cross, notwithstanding that the name has changed on the title to a small patch of underlying land." *Id.* at 1832 (Stevens, J., dissenting). "A less informed reasonable observer would reach the same conclusion because the cross would still appear to stand on Government property." *Id.* at 1834 n.4 (internal citation omitted). Justice Scalia responds as follows:

Barring the Government from "permitting" the cross's display at a particular location makes sense only if the Government owns the location. . . . But if the land is privately owned, the Government can prevent the cross's display only by making it *illegal* The principal dissent does not dispute that the original injunction did not require the Government to ban the cross's display on private land, yet it insists that the injunction nonetheless forbade transferring the land to a private party who could keep the cross in place. But there is no basis in the injunction's text for treating a sale of the land to a private purchaser who does not promise to take the cross down as "permitting" the cross's display, when

without forfeiting title—an assumption not shared by other members of the Court²³⁸—he argued that “[t]ransferring the land . . . would perpetuate rather than cure that unambiguous endorsement of a sectarian message.”²³⁹

Obviously, we must wait for the district court’s reconsideration on remand, the Ninth Circuit’s response to it, and the Supreme Court’s substantive determination (if ever) in order to know the exact contours of a constitutional transfer.²⁴⁰ The analysis should not center on the continued maintenance of a symbol but rather on ensuring the integrity of the group’s message. To transfer the symbol to a religious or civic organization is to allow the group to engage in its own symbolic expression with minimal government involvement.

From the perspective of government recognizing its semiotic limits and acknowledging the proper associations for such expression, the transfer to the VFW in my view was wise. In contrast, most of the commentary actually calls for an open bidding process precisely to ensure an equal opportunity for either preservation or removal of the

failing to forbid the cross’s presence on already private land within the [preserve] would not be treated as such. . . . The principal dissent responds that in determining whether the transfer complies with the original injunction we “cannot start from a baseline in which the cross has *already* been transferred.” But the effect of transferring the land to a private party free to keep the cross standing is identical, so far as the original injunction is concerned, to allowing a party who already owned the land to leave the cross in place.

Id. at 1825 n.2 (Scalia, J., concurring) (internal citations omitted).

238. There is dispute over whether the VFW must maintain a cross at the site. The opinions of Justices Kennedy, Alito, and Scalia each claim that the transfer did not require the cross to be kept in place, noting that only “a war memorial” is required. Justice Scalia holds that the VFW might move the cross to another private parcel and substitute a different memorial, or might sell the land to someone else who will maintain the cross. “The land reverts back to the Government only if ‘the conveyed property is no longer being maintained as a war memorial’ . . .” *Id.* at 1826 (quoting Dep’t of Def. Appropriations Act, 2004, Pub. L. 108-87, § 8121(e), 117 Stat. 1100 (2003)). Justice Stevens argues that private property becomes the subject of state action because the “purpose of the transfer is to preserve its display.” *Id.* at 1833 (Stevens, J., dissenting). “The cross is . . . not a purely ‘private’ object in any meaningful sense . . .” *Id.* at 1836. “[T]he plurality appears to conclude that the transfer might render the cross purely private speech. . . .” *Id.* Justice Stevens goes on to say,

I believe that most judges would find it to be a clear Establishment Clause violation if Congress had simply directed that a solitary Latin cross be erected on the mall in the Nation’s Capital to serve as a World War I Memorial. Congress did not erect this cross, but it commanded that the cross remain in place, and it gave the cross the imprimatur of Government. Transferring the land . . . would perpetuate rather than cure that unambiguous endorsement of a sectarian message.

Id. at 1842.

239. *Id.* at 1842.

240. After the Supreme Court decision was issued, the cross was stolen.

symbol.²⁴¹ In other words, commentators think that a transfer to the highest bidder gives an opportunity to a group to purchase and remove the symbol, on the assumption that transfer to the original speaker—even for fair consideration—is an illegitimate governmental goal. Such a model is unfairly constricting in this case. The VFW thought it was symbolically honoring the war dead on Sunrise Rock all those many decades. Transfer simply restored its chance to speak, on its own terms with symbols of its choice. Of course the transfer was not unlimited: a reverter clause made sure they would use the property for a war memorial. Like the government's power to close a public forum, the reverter clause ensures that private speech is not without constraint.

Such a privatizing mechanism should not become a common feature of the landscape, but it should be permitted when transfer to private organizations for fair market value is more generally permitted.²⁴² It should never be structured to involve government in ongoing maintenance or decisionmaking. And it should be invoked in cases in which the preservation of important values is at stake, and especially when an alternative burdensome process would yield the identical outcome.²⁴³

To place *Buono* within my framework of the effects of state appropriation and transformation of religious symbols for its own use, there is actually little evidence of state appropriation. Because there was no donation and acceptance, the spontaneous act of placing the cross on Sunrise Rock, and the subsequent lack of involvement by government for almost all of the cross's history, suggests that its message remained connected to the VFW. The Court has found that a donor group's message ends abruptly upon the government's acceptance of the monument—at which point it becomes government speech.²⁴⁴ But in *Buono*, it seems plausible to think of the preservation of the integrity of the group and its message in the face of the government's inattention and inaction, at least until 1999. Only between then and 2003, when the transfer to the VFW was made, does it make sense to think of the cross as "government speech." In this brief period, the government (according to the Ninth Circuit) unconstitutionally endorsed the VFW's religious message (or, one might argue, transformed the VFW's patriotic message into a

241. See, e.g., Jordan C. Budd, *Cross Purposes: Remedying the Endorsement of Symbolic Religious Speech*, 82 DENV. U. L. REV. 183 (2004).

242. The availability of this mechanism is particularly critical to protecting civic symbols (that contain religious elements) that are the target of advocacy groups. See Brief of International Municipal Lawyers Ass'n as Amicus Curiae in Support of Petitioner, *supra* note 15, at 3.

243. *Buono*, 130 S. Ct. at 1821 (Roberts, C.J., concurring).

244. See *supra* notes 97-102 and accompanying text.

religious one).²⁴⁵ Within my analytical framework, the transfer would allow the VFW to express its own message, on its own property.

V. CONCLUSION

The jurisprudential developments that encourage the governmental adoption and transformation of theologically significant symbols have occurred without considering harmful impacts on the symbolic expression of mediating associations in civil society. Religious associations can become enervated, content to offer their symbolic expression to the state, with the consequent loss of unique identity, purpose and voice. Without protections to secure the expression of those associations on private property and in broadly defined independent public spaces, religious freedom is illusory—especially if we think that symbols on government property can substitute for it.

Just because the state accepts the donation of a religious symbol does not mean that the donor groups have been strengthened; nor does the presence of this symbol on public property serve as a sign of robust religious freedom. I have argued to the contrary in this Article, that when government promotes or appropriates the religious messages of theologically active groups in civil society, the messages are diluted and the groups themselves are compromised, resulting in a negative impact on religious freedom. Remedying the situation does not necessarily require removal of existing objects or even the refusal of offered symbols: the state may redefine the property into a public forum (or recognize some other type of independent space) or may transfer the parcel of land on which the symbol sits (or will sit) to the donor. Such remedies sever the affiliation with the state and with it the damaging involvement done to the nonstate actor's identity, purpose, and expression.

245. Note, however, that the plurality in *Buono* clearly thought the government had used the cross in the way the VFW intended: as a war memorial, see *supra* note 230.